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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 373.

E. C. OSBORNE, Receiver of the Chattanooga Southern Railroad Company,
Plaintiff in Error

vs.

JENNIE B. GRAY,

In Error to the Supreme Court of Tennessee.

Motion to Dismiss Writ of Error and to Affirm Judgment, Together With Penalty, or to Transfer to the Summary Docket

FELIX D. LYNCH,
GEORGE W. CHAMLEE,
JOE V. WILLIAMS,
Attorneys for Defendant in Error.

B. E. TATUM,
P. H. THACH,
Of Counsel for Defendant in Error.

MACGOWAN-COOKE, CHATTANOOGA 6109

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E. C. OSBORNE, Receiver of the Chattanooga Southern Railroad Company,
Plaintiff in Error,

vs.

JENNIE B. GRAY.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

I.

MOTION TO DISMISS WRIT OF ERROR, AND TO AFFIRM JUDGMENT, TOGETHER WITH PENALTY, OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the defendant in error, Jennie B. Gray, by her attorneys of record herein, and moves this honorable court:

First: To dismiss the writ of error herein, on the ground that this court has not jurisdiction thereof, no Federal question being involved therein.

Second: To dismiss the writ of error herein, on the further ground that the assignment of errors filed in the Supreme Court of Tennessee, to secure said writ of error, fails to show that the appellate court of said state, namely, the Supreme Court of Tennessee, had denied to the plaintiff in error any title, right, privilege, or immunity claimed under the Federal Constitution or Federal Statutes, or that the decision of said appellate court of Tennessee herein was against any title, right, privilege, or immunity set up or claimed by the plaintiff in error; and for the additional reason that the said assignment of errors, as a result of which the writ of error was granted, entirely fails to show upon its face that any Federal question, right, privilege or immunity was passed upon or even considered in the decision and judgment of the said appellate court of Tennessee.

Third: To affirm the judgment of the Supreme Court of the State of Tennessee, on the ground that it is manifest that this writ of error was taken for delay only, and that the questions upon which the decision in this cause depend are so frivolous as to need little or no argument, having been repeatedly decided by this court contrary to the contention of plaintiff in error; and if the judgment of the Supreme Court of Tennessee be affirmed, that the defendant in error also have a judgment against the plaintiff in error and his security on bond for writ

of error, for ten per cent of judgment, and interest, as damages, and the costs incident to the writ of error.

Fourth: To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or to affirm because the case is of such a character as not to justify extended argument.

FELIX D. LYNCH,
GEORGE W. CHAMLEE,
JOE V. WILLIAMS,
Attorneys of Record for Defendant in Error.

B. E. TATUM,
P. H. THACH,
Of Counsel.

II.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendant in error will, on the twenty-fourth day of January, A. D., 1916, on the convening of the Supreme Court of the United States on that date, or as soon thereafter as a hearing may be had, submit for the consideration of the said court the foregoing motions, and each of them, and the brief and

argument in support thereof hereto attached, which are now served upon you herewith.

FELIX D. LYNCH,
GEORGE W. CHAMLEE,
JOE V. WILLIAMS,

Attorneys of Record for Defendant in Error.

B. E. TATUM
P. H. THACH,

Of Counsel.

Copy of foregoing motions and notice, together with points and authorities, argument and appendix, received this 13th day of December, 1915.

L. M. COLEMAN,

Attorney of Record for Plaintiff in Error.

III.

STATEMENT OF CASE AND PLEADINGS.

Defendant in Error, Jennie B. Gray, as the widow of James Gray, on September 18, 1908, brought suit in the Circuit Court of Hamilton County, Tennessee, against the Plaintiff in Error (and his then Co-Receiver, W. W. Kent, now deceased) as the Receivers of the Chattanooga Southern Railroad Company, a common carrier by railroad, to recover $25,000 damages for the death of her said husband, James Gray,

who, it was alleged, was injured on June 23, 1908, while in the employment of the said common carrier as a switchman, in the town of Alton Park, in the State of Tennessee.

On February 25, 1909, defendant in error filed her declaration, which sought a recovery alone for common law negligence. It was alleged, however, that the plaintiff in error was engaged in operating the Chattanooga Southern Railroad Company in the City of Chattanooga, Hamilton County, Tennessee, which road also extended into the states of Georgia and Alabama.

Certain defects were alleged as to the machinery and appliances of the engine and tender of the train upon which the said James Gray was injured, and which it was alleged had produced injuries causing his death.

This declaration alleged that at the time he received his injuries, he was ordered to throw a switch so that one of the cars of plaintiff in error could be switched to another track, and that while engaged in this work, and while riding on the foot-board of the tender of the engine, by reason of a certain insufficient and defective handhold, the said James Gray was thrown in front of the engine, which was then running backwards, and received injuries which resulted in his death.

The plaintiff in error filed a plea of not guilty to this declaration, but filed no special pleas.

Subsequently, and on May 17, 1909, the defendant in error, upon motion, was allowed to file an additional count. This additional count made the same charges of negligence as contained in the first or original declaration, and, in addition, set out certain other acts of negligence which contributed to bring about the injuries to the said James Gray.

This count further averred that the said James Gray "was in the employment of the said defendants, working as conductor on one of its passenger trains running from Gadsden, Alabama, to Chattanooga, Tennessee; that on said day and date, plaintiff's intestate, James Gray, was ordered and directed to leave his train when it reached the suburb of Alton Park, and to assist another crew of men in bringing a train from Alton Park to Chattanooga Tennessee;" and this additional or second count set forth that while engaged in this last named service, the said James Gray was injured.

To this second count of the declaration, plaintiff in error plead not guilty, but filed no special pleas.

It will thus be seen that both the original and the amended or second count of the declaration were based on common law negligence; this for the reason

that there was no averment in either that when deceased was injured he and his employer were engaged in commerce between the states.

The case was continued from term to term, and finally, on February 2, 1912, the defendant in error was allowed to amend of record her "amended declaration" so as to aver the following, to-wit: "And at the time of his said death, he and the defendants were engaged in operating a railroad between the States of Tennessee, Georgia, Alabama and other States," etc.

It will thus be seen that for the first time the point was made that plaintiff in error and the decedent James Gray were engaged in interstate commerce when the decedent received his injuries, and this had reference alone to the second count.

From and after this amendment, the case stood with the original declaration, or the first count, based upon common law negligence, and the additional or second count of the declaration as thus amended of record on February 2, 1912, based upon the Employer's Liability Act.

There were two trials of the case, the first of which was had on November 18, 1912, when the jury returned a verdict for the defendant in error for $10,000. As result of said verdict, judgment was entered in favor of the widow. This verdict and

judgment were based alone on common law negligence.

Thereupon, plaintiff in error made a motion for new trial, and the trial judge granted the same upon the ground that he had erred in his charge to the jury on the point of instructions as to the question of burden of proof.

The second trial was had on September 22, 1913, when the trial judge instructed the jury to return a verdict for plaintiff in error, which was done, and judgment entered accordingly.

The defendant in error preserved her exception to the action of the trial judge in giving a new trial in the first hearing, this being done by wayside bill of exceptions, and after the last trial she filed her motion for new trial, which was overruled. She thereupon prayed an appeal to the Court of Civil Appeals at Knoxville. That court reversed the action of the trial judge, and held there was no error in the instruction of the trial judge in the first trial, and affirmed the judgment entered in favor of the defendant in error on verdict of the jury.

The plaintiff in error then took the case by writs of *certiorari* and *supersedeas* to the Supreme Court of Tennessee, and that court affirmed the action of the Court of Civil Appeals.

In the first trial of the case in the lower court, there was no evidence whatever before the court which showed that the decedent James Gray and his employer, at the time of the accident, were engaged in operating cars carrying interstate commerce. However, after the first trial, counsel for defendant in error, fearing that on the second trial plaintiff in error might be able to show that at the time decedent received his injuries he and his employer were engaged in interstate commerce, and wanting to be able to meet this situation should it arise, offered to amend the writ or summons and the action by filing an amended count, setting up the fact that the defendant in error had been appointed administratrix of the estate of her deceased husband, so as to sue in the name of such personal representative for the right of action which she had preserved in her second count as thus amended based on the Employers' Liability Act. The husband had died without issue, and defendant in error, as the widow, was solely entitled to the recovery under both the state law (Sec. 4025 of Shannon's Code of Tennessee, 1896; Whaley v. Catlett, 103 Tenn. 351; Stuber v. Railroad, 113 Tenn. 305) and the Federal Employers' Liability Act. Under the rule announced by this court in *Wulf v. Railroad*, 226 U. S. 355, she was entitled to this amendment.

However, when this effort was made, counsel for plaintiff in error, for the first time, claimed that the

train upon which Gray was injured was engaged in interstate commerce, and objected to the proposed amendment. The trial judge sustained this objection, and in the second trial the same proof as used in the first trial was introduced, except that it was agreed (alone for the purposes of the second trial) that the train upon which Gray was working when he received his injuries was at the time engaged in interstate commerce.

In accordance with the practice in Tennessee, this first trial, exception to which was preserved by wayside bill of exceptions, was first disposed of in the appellate court.

> Chesapeake v. Higgins, 85 Tenn., 620;
> Railroad v. Scott, 87 Tenn., 497;
> Baugh v. Railroad, 98 Tenn., 119.

It is proper to state here that the Court of Civil Appeals of Tennessee, following the case of *Wulf* v. *Railroad, supra,* also reversed the action of the trial judge, and held that he should have allowed this amendment. This point was also affirmed by the Supreme Court of Tennessee, but inasmuch as the first judgment was affirmed, the point of amendment is not now material.

IV.

THE FACTS.

We presume counsel for plaintiff in error will not make any contention that there was any testimony whatever in the first trial showing even remotely that Gray and the plaintiff in error were engaged in operating a train carrying interstate commerce at the time Gray received his injuries; in fact, both parties have entered into a stipulation, for the purposes of this motion, as to just what the proof was in the first trial, which stipulation shows there was no testimony whatever that this train upon which Gray was working at the time he was injured was engaged in interstate commerce. This stipulation is as follows:

> "On the question as to whether the accident on which this suit is based occurred while the deceased and the plaintiff in error were engaged in interstate commerce, it is agreed that the testimony in the first trial of this case showed that the deceased Gray, on the day of the accident, came into Alton Park, Tenn., a suburb of Chattanooga, Tenn., as one of the trainmen on a train coming into Chattanooga on the plaintiff in error's line of railroad from the south; that at Alton Park two loaded fruit cars, which were to be delivered to the N., C. & St. L. Railway at Chattanooga, were cut out of this train for the purpose of being iced, and that the

deceased was ordered to bring them into Chattanooga after they had been switched to the icing station at Alton Park and iced; and that the accident occurred while he and other employees were engaged in switching said cars to said icing station at Alton Park.

"It is further stipulated that this agreement as to testimony shall apply only to the hearing of a motion of the defendant in error to dismiss petition for writ of error herein, or to affirm, and that in the event the motion shall be overruled, then the testimony in the record itself, and not this stipulation, is to be looked to in the hearing on the merits."

(Signed)

"L. M. Coleman, Atty. for plaintiff in error,
"Joe V. Williams, Atty. for defendant in error."

V.

POINTS AND AUTHORITIES.

The petiton for writ of error, and the assignment of errors accompanying same, should be dismissed, for the reason that neither of them show that the appellate court of Tennessee, the Supreme Court of that State, ever passed upon or considered a Federal question, and in view of this, the writ of error is without merit. (Seaboard Air Line Ry. v. Duvall, 225 U. S., 477.)

The only thing in this record to show that there is any Federal question involved here, is the certificate of the Chief Justice of the Supreme Court of Tennessee in allowing the petition for writ of error, and this statement is not of itself sufficient to give this court jurisdiction. (Seaboard Air Line Ry. v. Duvall, 225 U. S., 477.)

There is no Federal question involved in this record. The points involved are questions of (1) fact passed upon adversely to the plaintiff in error by the three courts of Tennessee, which is conclusive here (Dower v. Richards, 151 U. S., 658, Meidrich v. Louenstein, 232 U. S., 236), and (2) the interpretation of pleadings and the effect of amendments of pleadings, which are also binding upon this court. (Central Vt. Railway Co. v. White, 238 U. S., 507.)

The plaintiff in error makes the point that the amendment of record showing that Gray was engaged in interstate commerce at the time he received his injuries, applied to both the original and amended declaration, and that therefore the defendant in error could not recover for common law negligence set forth in the original declaration, for the reason that the pleading showed that the decedent was engaged in interstate commerce when injured.

Even if this were true, it made a variance, which question of variance was raised by the plaintiff in

error for the first time in the Supreme Court of Tennessee, and which, under the Tennessee practice, came too late. (Miller vs. Coger, 28 Tenn., 231; Pollard v. Huston, 75 Tenn., 689.)

The petition for writ of error and assignment of errors accompanying the same, should be dismissed for the reason that neither of them show that any title, right, privilege or immunity now claimed by the plaintiff in error was "especially set up or claimed" in any of the courts of Tennessee, and hence this court has no jurisdiction of the cause. (Seaboard Air Line Ry. v. Duvall, 225 U. S., 477); and the assignment of errors accompanying said petition for writ of error should be dismissed for the reason that said assignment of errors nowhere alleges that in any of the decrees in the courts of Tennessee the plaintiff in error was denied any title, right, privilege, or immunity claimed under the Federal Constitution or any Federal Statute, it being the duty of the plaintiff in error, under the practice in Tennessee, and in this court, to especially assign this as error in order to give this court jurisdiction. (Cleveland & Pittsburg R. Co. v. City of Cleveland, 235 U. S., 50; Seaboard Air Line Ry. v. Padgett, 236 U. S., 668; Seaboard Air Line Ry. v. Duvall, 225 U. S., 477; Loveman v. Bayless, 128 Tenn., 318; Michaels v. Post, 21 Wall., 389.)

The practice of claiming damages based on com-

mon law negligence in one count, and damages based on a violation of the Federal Employer's Liability Act in another count, is recognized and approved by this court. (Wabash R. Co. v. Hayes, 234 U. S., 86.) This practice was followed in this case, and the verdict and judgment thereon now attacked were given alone for common law negligence based upon a common law count, and in the trial of which there was no testimony whatever that the injured employee, when injured, was engaged in handling interstate commerce.

A writ of error will not lie where a state decision is sustainable on non-Federal grounds; hence where the record shows a Federal and a non-Federal question, and the case was disposed of below on the latter, this court will not take jurisdiction. (Allen v. Arguinban, 198 U. S., 149; Leonard v. Vicksburg, etc., R. R., 198 U. S., 416; Giles vs. Teasley, 193 U. S., 146; Hale v. Lewis, 181 U. S., 484.)

In Tennessee, where there are two or more counts in a declaration on the same cause of action, a general verdict in favor of the plaintiff will be sustained if there is evidence to sustain the allegations of any count. (Shepherd vs. Staten, 61 Tenn. 82.)

There is no question of law involved in the case, and the case having been brought here manifestly for delay, the judgment of the Supreme Court of

Tennessee should be affirmed, with ten per cent as damages added. (Texas & Pacific Ry. Co. v. Prater, 229 U. S., 177.)

VI.

ARGUMENT

It seems to us it is hardly necessary to make an extended argument in support of our motion to dismiss or affirm.

Counsel for plaintiff in error have agreed that the evidence in the first trial (and it is the first trial only with which we are now concerned) showed simply that Gray was injured on a train while at Alton Park, in the State of Tennessee, which train, according to the stipulation, "came into Alton Park, Tenn., a suburb of Chattanooga, Tenn., * * * on the defendant's line of railroad from the south."

This stipulation excludes the idea, of course, that such train had come from another state, or that it at the time carried cars which were being operated in carrying interstate commerce.

Plaintiff in error would have this court indulge the presumption that this court has jurisdiction. We respectfully submit that this court, nor any Federal court, can assume jurisdiction by presumption, but

that jurisdiction must affirmatively appear in the record. This rule was announced by Chief Justice Waite in *Ex Parte Smith*, 94 U. S., 456, as follows:

> "The facts upon which the jurisdiction of the courts of the United States rest, must in some form, appear in the record of all suits presented before them. To this rule there are no exceptions. * * * There are no presumptions in favor of the jurisdiction of the courts of the United States."

It will be seen from the written opinion of the Court of Civil Appeals of Tennessee, which is copied in the appendix hereto upon the point, that that court went thoroughly into the testimony upon this question, and found as a fact that this train was not in any wise engaged in interstate commerce. These written findings of fact were made a part of the decree of the Court of Civil Appeals, and this decree of the latter court was affirmed *in toto* by the Supreme Court of Tennessee, thus making the findings of fact upon this point concurrent. Under the established holdings of this court, these findings of fact are binding here. (Dower v. Richards, 151 U. S., 658; Meidrich v. Lauenstein, 232 U. S., 236.)

If there were any doubt upon this proposition, the contention of the defendant in error, to the effect that there was no testimony in the first trial showing that the train upon which Gray was injured

was engaged in interstate commerce, must be true, for the reason that in the first trial both the trial court and counsel for plaintiff in error treated the case as one based on common law negligence. This is shown by the fact that counsel for plaintiff in error made no request nor even an intimation to the trial court that the train in question was engaged in interstate commerce. Counsel for plaintiff in error contend that the Court of Civil Appeals and Supreme Court of Tennessee erred in the interpretation of the pleadings, and in the findings of fact and seek to raise a Federal question because of this.

No special plea setting up the Federal Employer's Liability Act as a defence was ever made to either count of the declaration in the lower court, nor was any notice of any such defence ever given. This was necessary, under the Tennessee practice.

Shannon's Code of Tennessee (1896), provides as follows:

"4634. The defendant may enter a general denial of the plaintiff's cause of action, equivalent to the general issue heretofore in use.

"4635. He may plead such general plea, whether such plea would have been good heretofore or not.

"4636. But whenever such general plea is filed,

the defendant shall, unless notice is waived, give notice of all his real defenses, whether by way of denial or avoidance, though such defense might have been admissible heretofore under the general issue. And no matter of defense of which notice is not given, shall be given in evidence or relied on. Such notice shall state such defenses separately, and if the same are not stated clearly, or are double or insufficient, they may be struck out on motion.

"4637. Or he may plead specially his defenses, in which case he shall state the facts relied on, truly and briefly as may be, and no matter of defense not pleaded shall be shown in evidence; and to such special plea the plaintiff shall reply, and the pleading shall proceed to issue as heretofore."

A writ of error will not lie where a state decision is sustainable on non-Federal grounds; hence, where the record shows a Federal and a non-Federal question, and the case was disposed of below on the latter, this court will not take jurisdiction. (Allen v. Arguinban, 198 U. S., 149; Leonard v. Vicksburg, etc., R. R., 198 U. S., 416; Giles v. Teasley, 193 U. S., 146; Hale v. Lewis, 181 U. S., 484.)

It is furthermore our contention that nowhere in the petition for writ of error or assignment of errors accompanying the same, is there any claim that the decision of the state court was repugnant

to the rights given to the plaintiff in error by the Federal Constitution or Federal Statutes; it is merely stated in the petiton for writ of error (the assignment of errors making no mention of this point at all), "that a decision of said Federal question was necessary to the judgment rendered." But no contention is made that the Supreme Court of Tennessee passed on or even construed a Federal question.

The certificate of the Chief Justice of the Supreme Court of Tennessee is insufficient in itself to confer jurisdiction on this court. (Seaboard Air Line Ry. v. Duvall, 225 U. S., 477.)

The claim made in the petition for writ of error, that the decision on said alleged Federal question necessarily denied these Federal rights and privileges claimed, is not sufficient to give this court jurisdiction.

The alleged Federal question set up in the petition for writ of error did not involve any construction of the Federal Constitution or any Federal Statutes, but simply touched a question of pleading, and this court, in the case of *Central Vermont Ry. Co.* v. *White, supra*, recently held that questions in a suit under the Federal Employer's Liability Act which relate to matters of state pleading and practice involving no construction of a Federal Statute, can not be considered on a writ of error from this court to a state court.

The Federal Employers' Liability Act in Section 1, fixes the liability only when an employee "suffering injury while he is employed by such carrier in such commerce."

In the first trial of this case, counsel for plaintiff in error made a motion for the trial judge to peremptorily instruct the jury to return a verdict for the plaintiff in error, solely upon the ground that when the decedent was injured he was not in the line of his employment. This claim was to the effect that Gray, when he was injured, was a volunteer or a trespasser. In making this motion, counsel for plaintiff in error stated this to the court:

> "I say, the proof is absolutely uncontradicted that at the time this man was injured, at the time he got on these steps, he was not in the discharge of his duty, but simply got on the running board to ride for his own purpose. It is perfectly clear that before that time Mr. Lloyd (Gray's superior) had a distinct understanding with him (Gray) that he would be allowed to go home and get his supper, and Lloyd was to do his work while he was gone, and when he came back then he was to bring the cars to the city."

Plaintiff in error, therefore, in the first trial insisted that the decedent was injured at a time when "he was not in the discharge of his duty, but simply

got on the running board to ride for his own purpose." If this statement be true, then, of course, the decedent did not suffer injury while employed by a common carrier engaged in interstate commerce, and, of course, the Federal Employers' Liability Act would not apply.

The theory of the plaintiff in error in the first trial, to the effect that the decedent was not in the line of his duty, but was simply a trespasser when he received his injuries, was squarely submitted to the jury by the trial court in the following instruction:

> "I charge you further, gentlemen of the jury, that it is the law that when a servant sustains an injury while attempting to do something not within the scope of his employment, he cannot recover; and I will state right here, gentlemen of the jury, that one of the contentions of the defendant is that the plaintiff had for the time being abandoned the service and was on his way to supper when he got on the tender, or foot rest of the tender, having no duty to perform. If you find from the greater weight or preponderance of the evidence as detailed to you, that this is true, that the plaintiff's intestate, James Gray, was at the time riding on the engine, not having any duty there to perform, but doing something without the scope of his employment, I charge you that the plaintiff would not be entitled to recover.

"I charge you further, gentlemen of the jury, that if you believe from the evidence in this case that the plaintiff's intestate, James Gray, had a duty to perform, but selected a place on the tender that was not a proper place for him to perform that duty, that he voluntarily took upon himself the duty of riding in a dangerous place, and that his so doing was the proximate cause of his injury, then in that event he is presumed to have assumed the risk of the dangerous place which he occupied, and will not be entitled to recover."

To show the fallacy of the position of plaintiff in error, it is only necessary to point out that in the first trial in the lower court plaintiff in error there insisted that if the decedent was in a place where his duty did not call him, then he would be guilty of such contributory negligence as would bar his recovery. The trial judge adopted this view, and this is the law in the State of Tennessee. (Patten v. R. R., 89 Tenn. 370; Saunders v. R. R., 99 Tenn. 130; Railroad v. Hayes, 117 Tenn. 696.)

But plaintiff in error now takes the remarkable position that that trial was controlled by the Federal Employers' Liability Act, notwithstanding the plain provision in that act, and as construed in Railway v. Duvall, 225 U. S. 477, that contributory negligence would have mitigated but would not have defeated the right of the defendant in error to recover.

The following rule was also announced in that case, which is especially applicable to the point under discussion here:

> "Excepting to a part of the charge by saying that an employee's going from the baggage car into the express car of a train is such an act that a reasonably prudent man would not have done under the circumstances, does not raise specific questions as to the construction of the Employers' Liability Act under which the action was brought, and give this court jurisdiction to review under Section 709, Rev. Stat."

It was manifestly the intention of Congress in the Federal Employers' Liability Act to make the decisions of the State courts final, unless, of course, some privilege or right otherwise given by the Federal Constitution or some Federal Statute is denied. In harmony with this suggestion, it is proper to note that this court, in the recent case of Southern Railway Co. v. Bennett, 233 U. S. 80, held that the excessiveness of a verdict given in a State court was a question alone for the State court, and could not be reviewed by this court, in the absence of a conclusion here that the judge and the jury were guilty of a connivance in escaping the limits of the law.

Inasmuch as this case comes from a State Court, the power of this court to review the decision of that court is controlled by Revised Statute, Sec. 709 (Sec.

237, Judicial Code), and, as pointed out by this court in the recent case of Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, this court cannot consider merely incidental questions not Federal in character. "That is," to quote the opinion in that case, "which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal Statute, to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that Statute because, when properly applied, no liability on his part from the Statute would result."

It is our contention that the questions raised by plaintiff in error to invoke the jurisdiction of this court are incidental, and not Federal in character. In view of the attitude of plaintiff in error in this case, these questions are frivolous, and we respectfully submit they were made not in good faith, but to secure delay in paying the judgment given to this widow by the courts of Tennessee.

Our statement that the effort to invoke the jurisdiction of this court is not made in good faith, is made because of the attitude of the plaintiff in error, in treating this case, until long after the trial with which we are here concerned, as a suit on the common law, and one wholly apart from the Federal Employers' Liability Act. The effort now to make

a Federal question is one born in the exigency of the situation, and, in view of this, we respectfully submit that this is a case where this plaintiff in error should be required to pay the maximum amount of damages, namely, ten per cent., as a penalty for this conduct. We understand the rule to be that such penalty will be assessed where there is no question of law involved (Texas & Pacific Ry. Co. v. Prater, 229 U. S. 177), and we most earnestly insist that no question of law can be raised to support a writ of error.

Respectfully,

FELIX D. LYNCH,
GEORGE W. CHAMLEE,
JOE V. WILLIAMS,

Attorneys of Record for Defendant in Error.

B. E. TATUM,
P. H. THACH,

Of Counsel.

APPENDIX

Pursuant to the rules and practices of this Honorable Court, and for the purposes of these motions only, defendant in error has caused to be printed the following parts of the transcript of record herein:

1.

ORIGINAL DECLARATION

The following is the original declaration, which was filed February 25, 1909:

The plaintiff, Jennie B. Gray, sues the defendants, W. W. Kent and E. C. Osborne, as receivers of the Chattanooga Southern Railway Company, who are duly in Court by the service of summons for the sum of $25,000, as damages, and for her cause of action shows the following statement of facts, to-wit:

That on or about June 23rd, 1908, and for a long time prior thereto the said W. W. Kent and E. C. Osborne were and had been and are now Receivers duly appointed, operating and controlling the Chattanooga Southern Railway Company, a corporation operating a line of railways in Chattanooga and Hamilton County, Tennessee, and extending into the State of Georgia and certain parts of the State of Alabama. One of its lines run from a point known as Alton Park, a suburb of Chattanooga, to the Union Depot in the City of Chattanooga, Tennessee. James Gray was the husband of the plaintiff, Mrs. Jennie B. Gray, and was an employee in the service of the defendants, working as a brakeman on one of its trains and sometimes acting as switchman and extra conductor.

The defendant had in its employ divers and many servants, engineers, conductors, foremen and vice-principals and owned and controlled many engines, cars, tracks, tenders, foot-boards, brake levers, brakes, couplings, with much machinery, fixtures and facilities for operating railroad trains. It was the duty of the defendant to employ and retain in their employ safe, sober, competent, fit and efficient servants, foremen, vice-principals and others to work with and to direct and to command the plaintiff's deceased husband what to do and how and when to perform his work, and to warn him of any danger that the defendants might know to threaten him or his said safety while in the service or employ of the defendants by virtue of his contract.

It was the duty of the defendants to furnish him a safe place in which to work, to furnish safe and sound machinery with which to perform his labor and to provide its engines or tenders with safe hand-holds and footboards and to provide its other employees with safe brakes and appliances for reversing engines, stopping trains and preventing accidents in cases of emergency, and to keep and maintain its tracks and rolling stocks in a safe and sound condition so as to prevent it from becoming "rickety", defective, dangerous and otherwise calculated to fail to perform its proper function or to become dangerous while being used by the plaintiff's intestate. It was also the duty of the defendants to employ and retain only in its employ with plaintiff's intestate competent and suitable servants who were in possession of all of ! faculties, with eyes to see and ears to hear and with a sober head to understand what was about to happen in case of any emergency. But the defendants violated, neglected and disregarded each and all of their said duties as aforesaid; and while so violating, neglecting and disregarding their said duties as aforesaid, they had in

their service an engineer on the day and year aforesaid, in charge of one of their engines and trains who was unfit and incompetent for the position he held as engineer in charge of its said train, but the plaintiff's intestate did not know and by the exercise of ordinary prudence could not have known that said engineer was incompetent, unsuitable and unfit servant to work for said defendants. But the defendants possessed a superior knowledge of the incompetency and unfitness of said engineer and knew, or by the exercise of reasonable prudence could have known, that said engineer was unfit for said position.

Plaintiff further charges, that said defendants were operating an engine and tender, and the machinery was defective and in a bad state of repair, and that the original construction of said machinery was improper and unsafe and that the defendants knew of a safe plan by which said machinery could have been constructed and operated, but it failed to adopt the safest and best plan for operating said engine, tender, cars and machinery on the day and year aforesaid; and while so neglecting each and all of its said duties as aforesaid, it ordered the plaintiff's intestate, James Gray, to throw a switch on one of its tracks so that one of its cars could come from Alton Park to Chattanooga, Tennessee, and it became necessary for said James Gray in order to comply with the commands of his superior on said occasion, to get on the tender and cross the train; and he stepped on said tender and the footboard thereof was out of repair and loose and rotten and the hand-holds on said engine were improperly constructed, out of repair, the timbers were rotten and they were in a dangerous condition, and the footboard was also improperly constructed and dangerous for a man to walk on. But plaintiff's intestate did not know of said dangers

and could not by the exercise of ordinary prudence know, and did not appreciate the dangers to which the defendants were exposing him in undertaking to comply with its orders, to walk across said footboards and to cross said train; and on account of the defects in the machinery, the footboard and the hand-holds on said tender, as aforesaid, and because of the unsafe and improper construction and the rotten and defective condition of the same, the said James Gray was caused to fall from said tender to the ground while said train was in motion, and because of the further fact that warning was given to the engineer in charge of said train at the time that the said James Gray had fallen or was thrown from said train in front of the moving engine, and on account of the unfitness and incompetency of said engineer and because of the defective machinery, improper construction, management and the defective tracks upon which it was being operated, the said James Gray was caused to fall in front of said engine and pushed along on the ground for a distance of about 125 feet; and at the same time this was happening persons witnessing said accident were hollering and giving the alarm to the engineer to stop the train and prevent an accident, but because of the negligence, wrongful and unlawful conduct of the defendants through its agents and servants, and while said James Gray, plaintiff's intestate, was in the actual and active performance of his said duties and without fault or neglect on his part he was caused to fall under and in front of one of defendants' engines and pushed along on said track a distance of about 125 feet, causing him to suffer great mental and physical pain and agony in both mind and body and to be run over by said engine, from which he then and there died.

The plaintiff shows that she is the widow of the said James D. Gray and that he was her husband, living with and

supporting her at the time of his death, wherefore she says she is damaged in the sum of $25,000, for which she sues and she demands a jury to try this case.

2.

ORDER ALLOWING AMENDMENT

On May 17, 1909, the following order was entered:

This case is passed and plaintiff allowed to amend her declaration, or file an amended declaration.

3.

ADDITIONAL DECLARATION OR SECOND COUNT

On November 29, 1909, the following Amended declaration was filed, which was denominated "Additional Declaration or Second Count":

The plaintiff, Jennie B. Gray, by leave of the Court, sues the defendants, W. W. Kent and E. C. Osborne, as Receivers of and for the Chattanooga Southern Railroad Company for the further sum of $25,000 damages, and for her cause of action states the following facts:

That the said Chattanooga Southern Railroad Company is a corporation, organized and existing under the laws of the states of Georgia and Alabama; that as such corporation it owned and operated a line of railroad from the City of Chattanooga, Tennessee, into the states of Georgia and Alabama; that on April 23, 1907, in the United States Circuit Court for the Southern Division of the Northern District of Georgia, in the cause of Pacific Improvement Company vs. Chattanooga Southern Railroad Company, said

defendants, W. W. Kent and E. C. Osborne, were appointed Receivers for the said Chattanooga Southern Railroad Company, and thereby acquired charge and control of all of the estate of the Chattanooga Southern Railroad Company; that said defendants, W. W. Kent and E. C. Osborne, since said day and date have been and are now operating, managing and controlling said Chattanooga Southern Railroad Company, as such receivers, and as such, own, use and control many locomotives, engines, tenders, freight cars, railroad tracks, yards, etc., and much machinery and appliances to carry on its said business, and one of its lines run from Chattanooga to Alton Park, Tennessee, a suburb of Chattanooga.

Defendants have and had in their employ divers and many servants, engineers, conductors, foreman and vice-principals; and on or about June 23, 1908, James Gray, the husband of the plaintiff, Jennie B. Gray, was in the employ of said defendants, working as conductor on one of its passenger trains running from Gadsden, Alabama, to Chattanooga, Tennessee; that on said day and date, plaintiff's intestate, James Gray, was ordered and directed to leave his train when it reached the suburb of Alton Park and to assist another crew of men in bringing a train from Alton Park to Chattanooga, Tennessee; the tender in use on the engine that was to bring the said train from Alton Park to Chattanooga was old, defective, out of repair and dangerous, in that said tender was not provided with proper and secure grab-irons or hand-holds at the end or sides of the tender, such as was in ordinary use by the railroads of the country at said time, and the cut-off-lever on said tender was old, defective, out of repair and broken so that it would slide or move several inches; said defendants knew or by the exercise of ordinary care and prudence could have

known of said dangerous and defective tender, but it negligently ordered and removed plaintiff's intestate from a reasonably safe place to work and placed him in a hazardous and dangerous place and negligently furnished him with old, defective, broken and dangerous machinery on, around and about which to work, and negligently and carelessly failed to give him any notice or warning thereof, and hence the plaintiff's intestate had no knowledge of same until he was injured as hereinafter mentioned.

That on said day and date it became necessary for the said James Gray, in order to comply with the orders and commands of his superior on said occasion, among other things, to give signals to the engineer in charge of said train, and in pursuance of this duty it was necessary for him to cross from one side to the other of the tender so that the engineer could see the signals given, and while in the line and discharge of the duties assigned him and in an effort to cross to the other side of the said tender, there being no grab-irons or hand-holds on the sides or ends of said tender, plaintiff's intestate was forced to catch hold of the cut-off-lever and when he did so, in its broken and defective condition said cut-off-lever slipped, thereby and on account of which plaintiff's intestate was thrown or knocked off of said tender and his limbs were caught by the trucks of said tender and the engine and tender ran over his body, horribly mangling his limbs and body, causing him to suffer great physical pain and mental anguish, from which he then and there died.

Plaintiff avers that it was the duty of the defendants to have furnished the said James Gray a reasonably safe place around and about which he was required to work, and to have furnished him with reasonably safe and suitable tools, machinery and appliances with which to do the work re-

quired of him, and not to have exposed him to the perils of an unsafe and dangerous appliance or machinery, and to have instructed him and warned him of the perils and dangers of said dangerous machinery and appliances, and how to have avoided said dangers, all of which plaintiff says defendants negligently, wrongfully and carelessly failed and neglected to do; and that defendants knew or ought to have known by the exercise of ordinary care and prudence that said machinery and appliances were defective, worn-out, broken, out of repair and dangerous, and that plaintiff's intestate did not know of its defective and dangerous condition and by the exercise of reasonable care and prudence could not have known of it; that plaintiff's intestate suffered the wrongs and injuries aforesaid by reason of the negligence of the defendants aforesaid, which was the proximate cause thereof; wherefore, plaintiff says that she is the widow of the said James Gray and that he was her husband, living with and supporting her at the time of his death, wherefore she says she is damaged in the sum of $25,000, for which she sues and demands a jury to try this cause.

4.

AMENDMENT OF RECORD OF SECOND COUNT OR AMENDED DECLARATION

On February 1, 1912, the amended or additional Declaration or Second Count of the declaration was amended of record, as follows:

In the above styled cause the plaintiff, Mrs. Jennie B. Gray, by permission of the Court, comes and amends her amended declaration of record so as to add to the second

line on top of the third page thereof after the words "he then and there died" the following averment: "And at the time of his said death, he and the defendants were engaged in operating a railroad between the States of Tennessee, Georgia, Alabama and other States, and the engineer in charge of said train of cars, was negligent, and unfit for the position he held, and this was known to the defendants, or should have been known to them, and after the said James Gray, who was the husband of and on whom the plaintiff was dependent for support, had been negligently thrown down, in front of the tender attached to the engine, and while his life was thus endangered, the engineer negligently pushed his body along in front of the tender about 125 feet, and if the engineer had not been deaf, or negligent, and unfit for his position, the life of James Gray could have been saved, even after he was thrown down in front of the tender attached to said engine."

5.

OPINION OF COURT OF CIVIL APPEALS.

The Court of Civil Appeals of Tennessee, in a written opinion, found the following facts:

This action was brought to recover damages for the negligent killing of plaintiff's husband, on the 23rd of June, 1908, in Alton Park, a suburb town of the city of Chattanooga. There have been two trials of the cause, the first resulting in a verdict in favor of plaintiff for $10,000, which, on motion of the defendants, was set aside by the trial judge for error in his charge. Plaintiff excepted to the action of the trial judge in setting aside the verdict and granting a new trial, and perfected and filed her wayside bill of ex-

ceptions. The case was again tried, when, on motion of the defendants, the trial judge directed the jury to return its verdict in favor of the defendants, which was accordingly done. Thereupon plaintiff moved for a new trial and, her motion being overruled, has appeal in error to this Court. The first assignments of error challenge the correctness of the action of the trial judge in setting aside the verdict for $10,000 and granting the defendants a new trial; and we will dispose of these assignments first, for, if we find it necessary to sustain them, it will perhaps not be important that we consider the errors assigned to the action of the trial judge in sustaining defendant's motion for a directed verdict at the close of the evidence heard during the second trial of the cause.

It is insisted by the learned counsel for the receivers that if the trial judge was in error in sustaining the motion to set aside the verdict for $10,000, his action in granting the new trial was nevertheless a proper one, for the reason that there is no material evidence, as he states in his brief, to support the verdict of the jury. On the motion for new trial, when the case was first heard, the defendants assigned as one ground and as a basis for their motion, that there was no evidence to support the verdict of the jury, and, if this was true, then the trial judge should have sustained the motion upon that ground, as well as upon the ground of error in his charge to the jury. It is insisted that if there is no evidence to support the verdict this Court will not reverse the trial judge and remand the cause when it finds there is no evidence on which to base a verdict for $10,000 and we will first examine the record to determine whether there was material evidence to support the verdict of the jury.

When this case was first brought into the Circuit Court of Hamilton county, and the declaration then filed, it alleged common law negligence, and did not make out a case of liability under the Employer's Liability Act, passed by Congress April 22, 1908, and amended April 5, 1910. The negligence averred in the declaration was the defective condition of the engine on which the deceased was riding at the time of his injury, and of the incompetency of the engineer in charge of it. The specific acts of negligence averred in the original declaration will not be set out, as we think it unnecessary to incumber this opinion with a detailed statement of them. It was averred that plaintiff was at work for the defendants at the time of his injury, as a brakeman on one of its trains, and sometimes acting as a switchman and extra conductor. In the original declaration it is also charged that the defendants, as Receivers, were operating and controlling the Chattanooga Southern Railway Company, a corporation operating a line of railroad in Chattanooga and Hamilton county, Tennessee, and extending into the state of Georgia and certain parts of the State of Alabama. One of its lines runs from a point known as Alton Park, a suburb of Chattanooga, to the Union Depot in the City of Chattanooga. It is next averred that the deceased was ordered to throw a switch on one of the tracks so that its cars could come from Alton Park to Chattanooga, Tennessee, and in order to do so, it was necessary that he get on the tender and cross the train; that he stepped on the tender, or on the footboard thereof, and that the footboard was out of repair and loose, and the hand-holds on the engine were improperly constructed and out of repair, both of which were dangerous, and which condition was not known to the deceased, and in complying with orders given him, he attempted to walk

across the footboard and across the train, and because of its defective condition and the defective condition of the handholds on the tender, the deceased was caused to fall from the tender to the ground, and was run over by the engine. This is in substance, and very briefly, the material parts of the original declaration filed in this cause.

On the 29th of November, 1909, plaintiff's counsel filed for her an additional count to the declaration, containing in substance the same averments set out in the first declaration. The additional matter added in the additional count is, that the Chattanooga Southern Railway Company was organized and existing under the laws of the States of Georgia and Alabama, and that it owned and operated a railroad from the City of Chattanooga, Tennessee, into the States of Georgia and Alabama. In this additional count it is also averred that, "one of its lines ran from Chattanooga to Alton Park, Tennessee, a suburb of Chattanooga." It is next averred as new matter, that the deceased, on the 23rd of June, 1908, "was working as a conductor on one of its passenger trains running from Gadsden, Alabama, to Chattanooga, Tennessee, and on that date, he was ordered to leave his train when it reached Alton Park, and assist another crew in bringing a train from Alton Park to Chattanooga, Tennessee. The defective condition of the engine and tender used to take the train from Alton Park to Chattanooga was substantially alleged in the additional count, as was in the original count of the declaration, and about the same averments were made as to how the deceased was injured as were set out in the original declaration. On the 1st of February, 1912, the additional count to the declaration, filed 29th of November, 1909, was amended so as to charge that "at the time of his death he and the defendants were engaged in operating a railroad between the States of Geor-

gia, Tennessee, Alabama and other states, and the engineer in charge of said train of cars was negligent and unfit for the position he held, and this was known to the defendants, or should have been known to them, and after the said James Gray, who was the husband of plaintiff, and on whom she was dependent for support, had been negligently thrown down in front of the tender attached to the engine, and while his life was thus endangered, the enigneer negligently pulled his body along in front of the tender about 125 feet, and if the engineer had not been deaf or negligent and unfit for his position, the life of James Gray could have been saved even after he was thrown down in front of the tender attached to said engine." The effect of this last amendment to the additional count filed 29th of February, 1909, was to make out a case of liability under the Act of Congress, called the Employer's Liability Act. Or, in other words, these two amendments operated to add an additional count to the original declaration, and to state a cause of action under the Employer's Liability Act. These amendments left the original declaration stating and charging a common law liability under the laws of Tennessee. We presume these amendments were made by plaintiff's learned counsel in order to meet the proof as it was developed during the trial of the cause. The original declaration clearly states a cause of action under the common law of Tennessee, against the defendants on one of its lines of railroad while they and the deceased were engaged in intra-state commerce in this State, while the additional count and the amendment thereto, make a case of liability under the Employer's Liability Act. Before the case was tried the first time, which was the 11th of September, 1912, the defendants had not filed an additional plea to the amendment made February 1st, 1912, and the case went to trial without any objection being made

by the defendants to the amendments, or any question raised thereon. Nor did they file any plea that the plaintiff could not prosecute her suit in her individual capacity under the Employer's Liability Act. The case was heard and the proof all introduced under the first count, that is, under the declaration as originally filed.

It is insisted by learned counsel for defendants that the proof heard during the first trial clearly shows that a case was made out showing liability under the Employer's Liability Act, that is, he insists that the proof is clear that the deceased and the defendant Railroad Company were engaged at the time of his injury and death, in an interstate transaction, that is, that he was switching or operating cars that had come from another State into Tennessee, and had not yet reached their point of destination. Appellant's learned counsel equally as strongly insists that the proof did not show, and it was intended that it should not make out a case under the Employers' Liability Act, but that the proof unmistakably makes a case where the deceased and the defendant company were, at the time of his injury, engaged in intra-state commerce.

If we should find that the proof showed that the deceased was engaged in interstate commerce when he was injured, then we would be compelled to hold that the trial judge was not in error in setting aside the verdict for $10,000 and granting the defendants a new trial. The proof indicates that the deceased came into Alton Park on a passenger train, and, as a part of this train there were three cars loaded with peaches. These cars were taken out of the passenger train at Alton Park, when the train went on to Chattanooga depot. After these fruit cars were taken out of the passenger train, the deceased was directed by one of his superiors,

to have them re-iced and then taken to Cravens and delivered to the N., C. & St. L. Railroad Company. The proof does not show that the passenger train on which the deceased came into Alton Park, and a part of which the fruit cars were, came from another state, and in fact fails to show where it came from. The proof likewise fails to show how far through, or into what part of Tennessee the railroad of defendant company is located, and to what point it operates trains. It was stated in the oral argument, and is repeated in the briefs of learned counsel for appellants, and the statement is made with much force and emphasis, that there was no proof heard during the first trial that remotely indicated that the deceased had been, or was at the time he received his injury, engaged in interstate commerce. The fruit cars which he was ordered to take and deliver to the Nashville road, so far as this record discloses, were taken out of a passenger train in Alton Park. The proof does not indicate where they came from, whether from another state, or whether they were picked up in Tennessee. The proof does not show where the passenger train came from, or whether it had ever been out of Tennessee or not. These fruit cars were cut out of it at Alton Park, a suburb of Chattanooga. The original declaration avers that the defendant company owned a line of road from Alton Park to Chattanooga, and that the deceased was ordered to take these fruit cars from Alton Park to Chattanooga. He was engaged in obeying these orders when he was injured.

In considering an assignment of error, that there is no evidence to support the verdict, this Court takes as true the strongest legitimate view of the testimony in favor of the verdict, and discards all countervailing testimony, because the jury, whose exclusive province it was to pass upon the credibility of witnesses has, by its verdict, resolved all con-

flicts in favor of the plaintiff. 96 Tenn., 119; 552; 100 Tenn., 82; 472; 105 Tenn., 187; 106 Tenn., 723; 112 Tenn., 128; 118 Tenn., 627; 121 Tenn., 715. In considering the question whether there is material evidence to support this verdict, we are bound to take as true the testimony of plaintiff's witnesses and consider that evidence alone, and if there is conflicting testimony offered by defendants, its testimony must be discarded and not considered in reaching a conclusion upon this assignment. This rule, we think, applies in this case, notwithstanding the trial judge set the verdict aside and granted a new trial. He did not set it aside because of any dissatisfaction he had of the verdict of the jury, but because of an error he supposed he had made in his charge to the jury. If he had thought there was no evidence to support the verdict, it is manifest that he would have given that as one reason why he set it aside and granted defendants a new trial. We are bound to presume that he believed the verdict sustained by the evidence. Acting under this rule, which has been repeatedly recognized by the Supreme Court, and by which it has often been governed, it is evident to us that a case was not made out by the proof at the first trial showing that the deceased was engaged in interstate commerce when he received his fatal hurt. We cannot say that the passenger train on which he came to Alton Park had been engaged in such commerce; nor can we say from this record, that the three fruit cars had then come from another state into Tennessee. We do not know where the passenger train came from, nor where these fruit cars came from; all we do know is, they were cut out of the passenger train at Alton Park, and the deceased was ordered to take them down into Chattanooga and deliver them to the N., C. & St. L. R. R. Co. That being true, the deceased and these cars were engaged in intra-state commerce when he received

his fatal injury, and not in interstate commerce. Being engaged in intrastate commerce, the defendants are liable under the laws of Tennessee, for such negligence as they or their employees were guilty of, that caused the death of plaintiff's husband.

Defendants' learned counsel further very earnestly insist that the proof does not make out a case of liability under the common law of Tennessee, and for that reason the trial judge was right in granting defendants a new trial. We are unable to agree with learned counsel's insistence in this respect. Taking the plaintiff's testimony as true, and discarding all countervailing or conflicting evidence, as we are bound to do, it appears that, after these fruit cars were taken out of the passenger train, they were then placed on what is called, the engine track. It is evident the deceased assisted in putting them on this track. As soon as they were placed there, an engine, in charge of Engineer Price, came out of the round house and was coupled to these cars, the front of the engine being coupled next to one of the cars. The deceased coupled the engine onto these cars, after which he opened the switch to allow the engine to push or back, these cars onto the main line of the road. After the engine had pushed the cars onto the main line, he then re-set the switch, when the engine started to pushing the cars in the direction of the refrigerator house, where they were to be re-iced. The deceased allowed the three fruit cars to pass him, and just as the rear of the tender reached where he was, he attempted to get upon the footboard which is attached to the lower part of the rear of the tender, and in doing so, slipped and fell under the engine and was killed. The proof showed beyond question that it is customary, and in fact it is the usual thing for railroad men, while doing switching in the yards of companies, when the en-

gine is moving from one part of the yard to another, for the switchmen to get upon the footboard on the rear of the engine, and ride from one point in the yard to another. It is stated that the switchman frequently have to do this in order to give signals to firemen or engineers. Some of the witnesses state that at times the fireman is engaged in shoveling coal and cannot see the signals from his side, and in such case, the switchman is compelled to get on the footboard and cross to the other side of the engine so as to signal the engineer. Plaintiff's proof shows that the deceased was engaged in switching operations at the time he received his fatal injury. But it does not show, and no one seems to know, why the deceased got upon the footboard. He had walked from the switchstand toward the depot and, as the engine passed going to the ice house, he stepped upon this footboard and because there were no toe holds to it, and because the hand-holds on the tender were defective and out of condition he fell and was killed. In view of the custom among switchmen to ride upon the footboard, and also to use it in passing from one side of the tender to the other, the jury had a right to infer, and no doubt did infer, that the deceased was on this footboard for some purpose connected with the switching operations probably to ride to the ice house, or perhaps to go on the other side to give signals to those on the engine, or it may be to cross to the other side of the track. Taking all of plaintiff's testimony and considering it altogether, the jury were well warranted in reaching the conclusion that the deceased was engaged in switching operations and in the line of his duty, or employment, when he attempted to get on the footboard of the tender. It makes no difference what defendants' witnesses say about why he was there, or where he was. The jury discarded such testimony and credited the plaintiff's wit-

nesses, and we are bound, under the rules, to take as true the statements of plaintiff's witnesses, and to hold, as the jury did, that the plaintiff's husband was engaged in switching operations, and in the line of his employment, at the time he attempted to get on the footboard and was killed. We are, therefore, necessarily bound to hold that there was proof, and we think the most credible proof, in the record to sustain the verdict of the jury in this case, and do not think the trial judge would have been warranted in setting it aside because there was no evidence to support it.

* * * * * *

As we have stated, when the case was first tried there were substantially two counts in the declaration, one for negligence under the common law of Tennessee, and one for negligence under the Employer's Liability Act. These counts both make one declaration. The additional count, together with its amendment, made one count of the declaration, while the declaration as originally filed, constituted the other count, and the two counts united, forming the declaration on which this case was first tried. 1 Lea, 657; 3 Heisk., 542; 3 Lea, 111; 104 Tenn., 346. So that we have when the case was first tried, a declaration containing two counts, one under the common law of Tennessee, and the other charging negligence under the Employer's Liability Act. The defendant, never at any time, while the suit was in the lower Court, raised any objection to the declaration on which the case was at first tried. The proof during the first trial, showed a liability for common law negligence, but it must be true that, before the second trial, plaintiff's learned counsel became apprehensive lest the proof in that case show negligence under the Employer's Liability Act, and if it did, then, under the provisions of that Act, she had no right to maintain her suit as an individual, and could only do so as a personal representative of her husband.

6.

JUDGMENT OF COURT OF CIVIL APPEALS

On July 18, 1914, the following judgment was entered in the Court of Civil Appeals of Tennessee:

This cause came on to be heard on the transcript of the record from the Circuit Court of Hamilton County, assignments of error, briefs and argument of counsel; from all of which the Court is of opinion and so orders and adjudges that there is reversible error in the judgment of the Court below in setting aside the verdict of the jury of $10,000 and granting the defendants below a new trial, and the assignment of error of the plaintiff to this effect is sustained; and for the further reasons stated in the written opinion of the Court which is filed and made a part of the record in this case, the judgment of the Court below is reversed and set aside and the verdict of the jury is reinstated and judgment will enter in this Court against defendants in error for $10,000, and interest thereon, from the date of the verdict of the jury, together with all of the cost of the cause.

It is accordingly ordered and adjudged by the Court that the plaintiff, Mrs. Jennie B. Gray, have and recover of the defendant in error the sum of $10,000 with interest thereon from the date of the verdict of the jury to-wit: October 11, 1912, to this date, July 21, 1914, in amount $1,066.67, making a total amount of $11,066.67, together with all of the cost of the case for all of which let execution issue.

On motion of G. W. Chamlee, Joe V. Williams and Tatum & Thach, attorneys for plaintiff, Mrs. Jennie B. Gray, a lien on the above recovery for their reasonable attorneys' fees is hereby declared and allowed.

7.

JUDGMENT OF SUPREME COURT OF TENNESSEE

The following is a part of the judgment of the Supreme Court of Tennessee, entered December 5, 1914:

This cause came on to be heard on the transcript of the record from the Court of Civil Appeals, petition for certiorari on behalf of defendants in error, assignments of error, briefs and argument of counsel; from all of which the Court is of opinion and so orders and adjudges that there is no reversible error in the judgment of the Court of Civil Appeals in reversing the judgment of the Court below, and re-instating the verdict of the jury and entering judgment thereon against defendants in error for $10,000 and interest thereon," etc., etc. (Tr. 233).

THE FOLLOWING IS PETITION FOR WRIT OF ERROR.

To the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee:

The petition of E. C. Osborne, Receiver of the Chattanooga Southern Railroad Company, respectfully shows:

(1) On the 17th day of September, 1908, Jennie B. Gray, as the widow of James Gray, commenced this suit in the Circuit Court of Hamilton County against Petitioner and W. W. Kent as Receivers, by appointment of the United States Circuit Court of the Northern District of Georgia, of the Chattanooga Southern Railroad Company, a railroad extending from Chattanooga in the State of Tennessee, to Gadsden in the State of Alabama. Said suit was brought to recover damages on account of the death of her said hus-

band on June 23, 1908, while he was in the employ of said receivers.

Before a judgment was rendered, said W. W. Kent died, and Petitioner was continued in charge of said railroad as sole receiver and the cause was revived against him as such.

(2) The declaration was filed February 25, 1909, and consisted of a single count alleging, in substance, that, in obeying an order to throw a switch, it became necessary for the deceased to get on the footboard of a locomotive and that the accident resulting in his death was caused by defects in the footboard, hand-holds, etc.

On May 17, 1909, an order was entered permitting the plaintiff "to amend her declaration or file an amended declaration". And, pursuant to this order, she filed, on November 29, 1909, an additional count so that the "amended declaration" consisted of two counts. The additional count alleged that deceased was working as conductor on a passenger train running from Gadsden, Alabama, to Chattanooga; that he was ordered to leave his train when it reached the suburb of Alton Park and to assist another crew in bringing a train from Alton Park to Chattanooga; that this made it necessary for him to go on the footboard and that the accident was caused by the defects mentioned in the original declaration.

On February 1, 1912, nearly four years after the accident, an order was entered permitting the plaintiff to amend her "amended declaration" of record by inserting an allegation to the effect that deceased, at the time of his death, was engaged in an interstate movement of cars. This was an amendment of the "amended declaration" and not of any

separate count thereof. The new allegation, therefore, became a part of each count.

(3) On October 11, 1912, upon the two counts, amended as above stated, and a plea of not guilty, the case was tried.

The evidence showed that deceased was a brakeman on a passenger train going north and bound for Chattanooga and carrying some refrigerator cars loaded with fruit; that when the train reached Alton Park these fruit cars were cut out of the train to be re-iced and then taken into Chattanooga for delivery to a connecting railroad; that deceased, if in the line of his duty, was, at the time of the accident, engaged in helping to switch these fruit cars to the icing station. The evidence, as a whole as Petitioner is advised, showed, at least by fair and necessary inference, that the cars which deceased was helping to switch were, at the time of the accident, in an interstate movement, and so, like the declaration, as amended, made a case within the Act of Congress commonly known as the Employer's Liability Act on which there could be no recovery in a suit by the widow in her own name.

But the Circuit Judge submitted the case to the jury and there was a verdict against Petitioner for $10,000.

Petitioner entered a motion for a new trial because there was no evidence to support the verdict and for error in the charge.

The Circuit Judge granted a new trial and the plaintiff took a wayside bill of exceptions.

(4) After this trial and after a new trial had been granted, the plaintiff asked leave to amend so as to sue as

administratrix as well as in her own right. The Court declined to permit this, upon the ground, that the time within which the Act of Congress commonly known as the Employer's Liability Act permitted a personal representative to sue, had expired.

(5) On the second trial the Court directed a verdict in favor of Petitioner for the reason that the case was controlled by the Employers' Liability Act of Congress and hence that there was no right of recovery in favor of the widow in her own name, and the plaintiff appealed to the Court of Civil Appeals.

(6) The Court of Civil Appeals first considered the record of the first trial and, reversing the action of the Circuit, rendered judgment upon the verdict of the jury without interest, and also held that the amendment asked for after the first trial should have been allowed.

In that Court, Petitioner, in support of its motion for a new trial, because there was no evidence to support the verdict insisted (1) that both counts of the declaration, as amended, made a case which was controlled by the Employers' Liability Act of Congress and hence the plaintiff in her right as widow could not recover, and (2) that the evidence on the first trial brought the case under the control of the same Act of Congress. Petitioner further insisted that the amendment, applied for after the first trial, was properly refused because it came too late under the Employers' Liability Act of Congress.

But that Court treated the original declaration as not amended and not stating a case within said Act of Congress, and held that the evidence on the first trial did not show

that the accident occurred in the course of an interstate movement.

It was also held that under the Employers' Liability Act of Congress as construed in Missouri, etc., vs. Wulf, 226 U. S., 570, the amendment asked for before the second trial should have been allowed.

(7) To review the action of said Court of Civil Appeals, Petitioner filed a petition for certiorari in the Supreme Court of Tennessee, that being the highest court of law or equity in the State of Tennessee. The prayer of said petition was granted and the cause heard by said Supreme Court. But, on the hearing, that Court affirmed the judgment of the Court of Civil Appeals, and on December 5, 1915, rendered a judgment against Petitioner for $11,316.55 and costs.

In said Supreme Court, petitioner, by proper assignments of error again insisted that both counts of the declaration and also the evidence on the first trial made a case within the Employers' Liability Act of Congress and that, under that Act, the amendment asked for before the second trial was properly declined.

(8) Petitioner further shows that the said judgment of said Supreme Court was and is a final judgment in the highest Court of the State of Tennessee, in which a decision in said suit could or can be had.

(9) Petitioner further shows that the following Federal questions were made in said case, viz:

1st. Whether each count of the declaration, as amended, makes a case controlled by the Employers' Liability Act of Congress so that the plaintiff cannot recover as widow.

2nd. Whether the evidence on the first trial made a case controlled by said Act of Congress.

3rd. Whether, under the Employers' Liability Act of Congress, a suit commenced by a widow, in her own name, can be amended by making the personal representative a party plaintiff after more than two years have elapsed since the right of action accrued.

And Petitioner shows that said judgment of said Supreme Court was repugnant to and in conflict with the laws of the United States and the Act of its Congress aforesaid and that said judgment of said Supreme Court was contrary thereto, and that a decision of said Federal questions was necessary to the judgment rendered. Wherefore, your Petitioner presents herewith an exemplified transcript of the record of the Supreme Court of Tennessee in said case and prays that a writ of error to said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon a compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate as a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Supreme Court be reversed.

E. C. OSBORNE, Receiver.

By COLEMAN & FRIERSON,
Attorneys.

9.

THE FOLLOWING IS ASSIGNMENT OF ERRORS:

1.

The Court erred in not holding that both counts of the declaration stated a case controlled by the Act of Congress commonly known as the Employers' Liability Act and that, therefore, the widow could not recover in a suit commenced and prosecuted in her own name.

2.

The Court erred in not holding that the evidence on the the first trial made a case controlled by the Act of Congress commonly known as the Employers' Liability Act.

3.

The Court erred in not holding that the Circuit Court properly declined to allow any amendment permitting the suit to be prosecuted in the name of a personal representative because the application to so amend was not made until more than two years after the right of action accrued and, therefore, came too late under the terms of the Act of Congress commonly known as the Employers' Liability Act.

(Signed) COLEMAN & FRIERSON,
Attorneys for Petitioner in Error.

[redacted]

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Supreme Court of the United States

OCTOBER TERM, 1915.

No. 373.

E. C. OSBORNE, Receiver of the Chattanooga Southern Railroad Company,
Plaintiff in Error,

vs.

JENNIE B. GRAY,
Defendant in Error.

IN ERROR TO SUPREME COURT OF TENNESSEE.

I.

REJOINDER TO REPLY BRIEF FOR PLAINTIFF IN ERROR.

Counsel for plaintiff in error, in their reply brief (page 14), in effect admit that if there is any Federal question involved here, and if this court has jurisdiction at all, that such Federal question and jurisdiction must appear from facts judicially known to this court.

It is pointed out in the reply brief that the proof showed that the train in question had come from the south; that when it arrived at Alton Park two cars were cut out to be iced, and that while engaged in switching these cars defendant in error's husband was injured. It is then stated that this court will judicially know that Chattanooga is almost on the State line, and that trains coming from the south must necessarily come from the State of Georgia.

As pointed out in our original brief, jurisdiction in Federal courts is never presumed (Ex parte Smith, 94 U. S. 456). It is not necessary to cite authorities to the effect that this court must assume jurisdiction, if jurisdiction it has, under Section 237 of the Act of Congress approved March 3, 1911.

In view of the plain words of this statute, counsel for plaintiff in error can only claim that this court has jurisdiction by concluding that the court judicially knows certain facts; and to take jurisdiction counsel for plaintiff in error would have the court to indulge the presumption, to cure counsel's error in failing to offer proof in relation to same, that the train and the deceased were at the time of the accident engaged in interstate commerce.

Distances, locations and matters of a similar nature, may be judicially known to the court, but they are not judicially known in order to give the court jurisdiction, and this was so held by this court in the case of Arkansas v. Kansas & Texas Coal Company, 183 U. S. 185. In the opinion in that case, Mr. Chief Justice Fuller quoted with approval the following text from Mr. Thayer on Evidence, Chapter VII. page 281, as follows:

> "And as to judicial knowledge, the principle applies 'that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them.' Thayer, Ev., Ch. VII. 281."

In passing upon the point that a matter of the nature insisted upon here cannot be judicially known to the court so as to give jurisdiction, Mr. Chief Justice Fuller further said:

> "In Mountain View Mining & Milling Co. v. McFadden, 180 U. S. 533, which was a petition for removal, the suit was one brought in support of an adverse claim under the Revised Statutes, Sections 2325, 2326, and it had been previously decided that such a suit was not one arising under the laws of the United States in such a sense as to confer jurisdiction on the Federal Courts, regardless of the citizenship of the parties. And we said: 'It is conceded by counsel on both sides that those decisions are controlling, unless the Circuit Court was entitled to maintain jurisdiction by taking judicial notice of the fact,' that the Mountain View lode claim was located upon what had been or was an Indian reservation,' and, 'of the Act of Congress declaring the north half of the reservation, upon which the claim was located, to have been restored to the public domain,' notwithstanding no claim based on these facts was stated in the complaint. But the Circuit Court

> could not make plaintiff's case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge.' Oregon Short Line, Etc., Railway v. Skottowe, 162 U. S. 490; Chappell v. Waterworth, 155 U. S. 102; Commonwealth v. Wheeler, 162 Mass, 529; Partridge v. Strange, Plowden, 77."

Learned counsel for the plaintiff in error, in stating what facts the court will take judicial notice of, go to desperate lengths and beyond the point that any court in this country or any other has ever gone.

The court, of course, will judicially know the location of Alton Park, and perhaps the distance therefrom to the State line; but further than this, we respectfully submit, the court will not go.

Counsel for plaintiff in error would have the court judicially know "that passenger trains are run over considerable distance for the purpose of picking up passengers along the route," and this, notwithstanding the record in this case, from beginning to end, has not a word about any passenger being on the train with which Gray was working when injured. In other words, the record shows, in so far as the material which the train was transporting, was composed of two fruit cars which had to be taken out at Alton Park and iced.

Counsel for plaintiff in error further insist that the court will take judicial knowledge of the fact that the train in question must necessarily have come from the State of Georgia; this notwithstanding the

declaration in the case shows that the railroad of plaintiff in error extended from Chattanooga, Hamilton County, Tennessee, into the State of Georgia and certain parts of the State of Alabama. (See appendix to brief of defendant in error, page 20.)

If the court will judicially know all these facts, then the court will further judicially know that the States of Georgia and Alabama have their corner lines just south of the City of Chattanooga, and in the absence of proof, we respectfully submit the court might as well judicially know that the railroad line of plaintiff in error extended first into the State of Alabama before reaching the State of Georgia.

We respectfully suggest to the court that it will not judicially know any fact that involves a matter so serious as the claim to its jurisdiction, and especially where such judicial knowledge has to be invoked in order to cure what may be termed a palpable error on the part of counsel, whose duty it was to prove such facts to show jurisdiction beyond any question.

If the court can take judicial knowledge of the matters insisted upon by counsel for plaintiff in error, it can take judicial knowledge of most anything. The ridiculousness of this contention can be illustrated by stating to the court that the accident in question happened in the month of June; that Chattanooga is in the heart of a fruit and vegetable belt in the South; that it is commonly known that when fruit and vegetables are placed in cars that the cars are immediately iced; that these two cars which Gray was engaged in switching when he was injured had not been iced, because he was taking them to a

switch for that purpose; that evidently they had just been picked up at some point near or adjacent to Alton Park; further, that it is commonly known that trains which run through fruit belts have sidings every mile or so where truck farmers load their fruit and vegetables for shipment; that the distance from Alton Park to the State line is some five or six miles; that this point is in a rich farming district where much fruit and vegetables are grown. Now, with all these things commonly and judicially known to the court, why is it not just as reasonable to assume that the court will judicially know that the two cars in question had rested upon a siding in the edge of the town of Alton Park, and that the train in question had gone from Alton Park out to this siding, had picked up these two cars and had brought them into Alton Park so as to have the two fruit cars iced and then taken to Chattanooga? We contend that it is the duty of the court to judicially know these things as much as it is the duty of the court to take cognizance judicially of the matters insisted upon by learned counsel for the plaintiff in error. A mere statement of these things is conclusive proof of the danger of enunciating any such rule, and especially where so serious a matter as the jurisdiction of the court is involved.

II.

Since writing our former brief we have read the opinion of this court in the case of Chicago, Rock Island & Pacific Railway Company v. Devine, just published in the advance sheets containing the opinions of this court. The rule announced in headnote

3 to the opinion in that case is applicable to the facts here, and is as follows:

> "The contention on a writ of error to a state court in a case arising under the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149 Comp. Stat. 1913, Sec. 8657), that the trial court should have instructed a verdict in favor of the railway company on the ground that there was no evidence tending to show either negligence or that the company or the deceased at the time of the particular transaction from which the injury arose, was engaged in interstate commerce — is too lacking in substance to prevent the granting of a motion to affirm, where what is really involved is a mere dispute concerning the weight of conflicting tendencies of proof. (For other cases, see Appeal and Error, VII. g, in Digest Sup. Ct. 1908.)"

III.

Counsel for plaintiff in error state that the Court of Civil Appeals of Tennessee does not disclose whether the train in question was engaged in interstate or intrastate business.

It is true the opinion of that court stated the court could not tell whether the train had come from another state, or not, but the court, in holding that the plaintiff below was entitled to recover on the common law and first count of the declaration, necessarily concluded that the train was not engaged in interstate commerce.

This court will see that the opinion of the Court of Civil Appeals (see its opinion, page 41 of the brief

for defendant in error) found as a fact that the proof failed to show that this train had come from another state. In addition to this, we might suggest that under the common law count of the declaration, the defendant in error had a right to recover when she showed that the deceased was injured through the negligence of the plaintiff in error. It was no part of the duty of the defendant in error to show from where this train had come, or to what point it was going, to predicate a right of recovery in an action based on common law negligence. It was a defense of the plaintiff in error, in order to defeat recovery for common law negligence, to show that the train upon which defendant's husband was working had come from another state, and this naturally placed the burden of proof upon the plaintiff in error to do this, and, as found by the Court of Civil Appeals and Supreme Court of Tennessee, this burden was not successfully carried by the plaintiff in error; in fact, as found by both those courts, there was no effort on the part of plaintiff in error to show where the train had come from.

The effect of the insistence of counsel for plaintiff in error in this case would be that this court is bound to supply, by judicial knowledge, certain material facts involving jurisdiction, which plaintiff in error entirely overlooked, and which could have been easily proven, if the facts were as now insisted by plaintiff in error.

Until the contrary is alleged or shown, it will be presumed in an action for injuries to a railroad employee through the negligence of his employer in the use or operation of its railway within the state, that

he was engaged in intrastate commerce, and that he is seeking a remedy under the laws of the state.

Erie R. Co. v. Welsh, 89 Ohio 81.

Bradbury v. Chicago R. I. & P. Ry. Co., 149 Iowa 51-63.

Chicago R. I. & P. Ry. Co. v. McBee, 145 Pac. (Okla.) 331.

The Oklahoma decision, on the question of judicial knowledge, is especially in point:

> "While this court may properly, in certain cases, take judicial notice of the fact that anyone of the many great trunk lines of railway extending through the various states is engaged in interstate commerce, yet the fact is equally as notorious and as much the subject of judicial notices that every such railway is also engaged in intrastate traffic; and clearly it is not a matter of such general knowledge as to dispense with proof that any specific portion of the equipment or any particular employe of such railway is engaged in interstate, rather than intrastate commerce at any precise time or place. The only evidence in this case as to the character of commerce in which defendant and deceased were engaged, is that the engine which was being watched by, and exploded and caused the death of, the said John M. McBee, was used in hauling a passenger train between points in this state."

The decision in Erie R. Co. v. Welsh, supra, precents a similar question to the one in the instant case, and the utterance of the Ohio court upon that question is also applicable to the position of the defendant in error here:

"It is only necessary that it aver the facts that show that the federal act, and not the state law, applies. This tenders an issue of fact, which, if denied by the reply, must be determined as any other issue of fact in the case."

* * *

"In this case, however, it does not appear that there is any conflict of evidence, at least no material conflict. If we are correct in the proposition that the presumption obtains that the law of the forum applies to the transaction, then it is necessary in order to overcome this presumption to show that the plaintiff at the time of the injury was actually employed in moving or handling cars engaged in the interstate traffic."

We respectfully insist that the plaintiff in error cannot secure the jurisdiction of this court by any such means as here insisted upon.

IV.

Counsel for plaintiff in error, notwithstanding the construction the Tennessee courts have placed upon the pleading, now insist that the amendment of record of February 1, 1912 (set forth at page 34 of our brief in support of motion), which brought into the case for the first time the Employers' Liability Act, was an amendment of both the original and the amended declarations.

This court will see that this amendment referring to the Employers' Liability Act included certain averments which were to apply alone to the "Amended Declaration," and were to follow the words "he then and there died," found "in the second line on top of the third page thereof."

It must also be remembered that the trial court, which first construed these declarations, had before it both the original and the amended declarations, just as they had been filed. Inasmuch as the trial court had before it this amended declaration, and could see that the amendment of record applied alone thereto, and not to the original declaration, the two appellate courts had a right to assume, of course, that the trial court made no mistake in concluding that this amendment of record applied alone to the amended declaration.

V.

It is hardly necessary to call the attention of the court to the fact that plaintiff in error could not be prejudiced in any wise by the verdict and judgment entered thereon in the first trial. The decedent left no issue, and the defendant in error, as his widow, was the sole beneficiary in this action, both under the laws of Tennessee and the Employers' Liability Act (Shannon's Code of Tennessee (1896), Secs. 4025 and 4026.) After the first trial, and after judgment was entered on the verdict, the affirmance of which we are here insisting upon, defendant in error attempted to amend her action so as to show that she had been appointed administratrix of her deceased husband, and to thereafter prosecute the suit as such personal representative, and also as the widow. Plaintiff in error resisted this effort, and the argument that plaintiff in error now makes, that it is invoking Federal rights here as a shield and protection against this judgment in favor of the widow, is evidently not made seriously. All the parties were before the court that could have been brought before

it, whether the suit was under the common law or under the Employers' Liability Act; and we insist that the petition for writ of error should be dismissed and the judgment of the Supreme Court of Tennessee should be affirmed, with penalty.

Respectfully,

FELIX D. LYNCH,
GEORGE W. CHAMLEE,
JOE V. WILLIAMS,
Attorneys of Record for Defendant in Error.

B. E. TATUM,
P. H. THACH,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 373

E. C. OSBORNE, Receiver of the Chattanooga Southern Railroad Company,
Plaintiff in Error

vs.

JENNIE B. GRAY,
Defendant in Error

In Error to Supreme Court of Tennessee

Brief for Plaintiff in Error

LEWIS M. COLEMAN,
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MACDOWAN-COOKE, CHATTANOOGA 6841

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Supreme Court of the United States

OCTOBER TERM, 1915

No. 373.

E. C. OSBORNE, Receiver of the Chattanooga Southern Railroad Company,
Plaintiff in Error
vs.
JENNIE B. GRAY,
Defendant in Error,

BRIEF OF PLAINTIFF IN ERROR

STATUS OF THE CASE. This is a writ of error to the Supreme Court of Tennessee to review a judgment for $11,316.55 as damages for the death of the husband of defendant in error.

The case has been before this court on a motion to dismiss the writ of error or affirm the judgment, and plaintiff in error has filed his brief in opposition to that motion. The court, however, has postponed the determination of the motion until the hearing on the merits, and has placed the case on the summary docket.

THE RECORD. Counsel have signified, in writing, that they are satisfied for the case to be heard on the parts of the record printed as an appendix to the motion to dismiss or affirm together with the stipulation which is printed as an appendix to this brief.

STATEMENT OF THE CASE.

HISTORY OF THE CASE. The defendant in error sued in her own name in a state court at Chattanooga to recover of the plaintiff in error, as receiver of the Chattanooga Southern Railroad, an inter state carrier, damages for the death of her husband while employed by plaintiff in error on that railroad.

There were two trials before a court and jury. On the first, there was a verdict for $10,000.00. This was set aside for error in the charge, another ground assigned for a new trial, but not specifically passed on by the court, being that there was no evidence to support the verdict. The defendant in error preserved a wayside bill of exceptions.

On the second trial, the court directed a verdict for the plaintiff in error upon the ground that. the accident having occurred in interstate commerce, the case was controlled by the Federal Employer's Liability Act and there could be no recovery by the widow in her own name. And the defendant in error appealed to the Court of Civil Appeals of Tennessee.

That court, under the Tennessee practice, heard the case first on the record of the first trial and, reaching the conclusion that the verdict should not have been set aside, entered a judgment on it, without considering the record of the second trial.

From the opinion, it appears (1) that the court was of the opinion that there was no error in the charge; (2) that notwithstanding this, if it appeared that there was no evidence to support the verdict, the action of the trial judge in setting it aside would be affirmed; (3) that the insistence that there was no evidence to support the verdict was based on the contention that both the declaration and the proof showed the accident occurred in interstate commerce and, therefore, the widow could not recover in her own name; (4) that one count of the declaration did show that the accident occurred in interstate commerce and no recovery could be based on it; (5) that, in the opinion of the court, the other count did not show this fact but was a good count under the laws of Tennessee; (6) that, in the opinion of the court, the evidence did not show whether the accident occurred in interstate or intrastate commerce; and (7) that, therefore, there was evidence to support a verdict based on the Tennessee count.

Upon petition for the writ of certiorari, the

Supreme Court of Tennessee, without an opinion, affirmed the judgment and made it final.

THE PRESENT INSISTENCE is that, (1) both counts of the declaration show that the accident happened in interstate commerce, (2) the evidence showed this fact, and (3), therefore, there was no evidence to support a verdict under either count.

THE DECLARATION, as originally filed, consisted of a single count. Later, under leave "to amend her declaration, or file an amended declaration", defendant in error filed what, in the record, is styled "an additional declaration or second count". (Appendix to motion to dismiss pp 27-34).

Both counts alleged that plaintiff in error was operating an interstate railroad extending from Chattanooga, Tennessee, into the states of Georgia and Alabama, one of its lines being from Alton Park, Tennessee, a suburb of Chattanooga, into Chattanooga; and that in an effort to get on the footboard of an engine and cross, on it, from one side to the other, deceased was killed at Alton Park, by reason of certain defects. Aside from these allegations, common to both counts, the two counts stated radically different cases.

The first alleged (1) that deceased was ordered to throw a switch so that a car "could come from

Alton Park to Chattanooga"; and (2) that, to comply with this order, he made the effort which resulted in his death. On the other hand, the second alleged (1) that deceased was working as conductor on a passenger train running from Gadsden, Alabama, to Chattanooga, Tennessee, (2) that, at Alton Park, he was ordered to leave his train and to assist another crew to bring a train from Alton Park to Chattanooga; (3) that to comply with this order, it was his duty, among other things, to give signals to the engineer from the foot board, for which purpose it was necessary for him to cross from one side of the engine to the other; and (4) that, for this reason, he made the effort which resulted in his death.

The distinctive difference between the two cases thus stated is that, in one, the only thing alleged to be his duty was to throw a switch and let a car pass, while, in the other, he was one of the crew charged with the duty of taking a train into Chattanooga and was required to be on the footboard for the purpose of giving signals.

It will be observed that neither count alleged that the car or train, which was to come or be brought into Chattanooga, was in interstate commerce. But later, by a minute entry, the "amended declaration" was amended by inserting after the words "he then and

there died," which are the concluding words in the next to the last paragraph of each count, an allegation of interstate commerce. (Appendix to motion to dismiss p 34.)

It was upon the "amended declaration" so amended that the case was tried.

THE FACTS SHOWN BY OPINION OF COURT. There was no conflict in the evidence bearing on interstate commerce.

We quote the opinion:

> "The proof indicates that the deceased came into Alton Park on a passenger train, and, as a part of this train, there were three cars loaded with peaches. These cars were taken out of the passenger train at Alton Park, when the train went on to Chattanooga depot. After these fruit cars were taken out of the passenger train, the deceased was directed, by one of his superiors, to have them reiced and then taken to Cravens and delivered to the N., C. & St. L. Railroad Company. The proof does not show that the passenger train on which the deceased came into Alton Park, and a part of which the fruit cars were, came from another state, and in fact fails to show where it came from. The proof likewise fails to show how far through or into what part of Tennessee the railroad of de-

fendant is located, and to what point it operates trains. * * * * The fruit cars which he was ordered to take and deliver to the Nashville road, so far as this record discloses, were taken out of a passenger train in Alton Park. The proof does not indicate where they came from, whether from another state, or whether they were picked up in Tennessee. The proof does not show where the passenger train came from, or whether it had ever been out of Tennessee or not. * * * * We do not know where the passenger train came from, nor where these fruit cars came from; all we know is, they were cut out of the passenger train at Alton Park, and the deceased was ordered to take them down into Chattanooga and deliver them to the N., C. & St. L. R. R. Co." (Appendix to motion to dismiss pp 40-2.)

FACTS SHOWN BY STIPULATION. The stipulation printed as an appendix hereto, shows that the evidence establishes the further facts that the passenger train in question had left Chattanooga at 7 o'clock in the morning and came to Alton Park from the South, on its return trip, late in the afternoon, when the accident happened.

FACTS JUDICIALLY KNOWN. The trial court judicially knew and, therefore, this court will know the following facts:

(1) Chattanooga is within four or five miles of the line between Tennessee and Georgia. (2) Its suburb of Alton Park is directly to the south and almost on the state line. (3) The Chattanooga Southern Railroad extends from Chattanooga in a southerly direction to the state line and then across the State of Georgia to Gadsden in Alabama.

A passenger train leaving Chattanooga at 7 o'clock in the morning over this railroad and returning late in the afternoon must, on its return trip, have come from outside Tennessee.

The case which the court found there was evidence to support was, in fact, the case stated in the second count and not that stated in the first.

It must be borne in mind that according to the first count, the deceased was only to throw a switch and let a car pass on to Chattanooga. The necessity for getting on the car to perform this act must, therefore, have preceded the throwing of the switch and the passing of the car.

The case of taking charge of cars and engaging in switching operations from one part of the yard to another is stated only in the second count. And this is the case the court held was made out not only as clearly shown by what has already been quoted, but also by the following facts recited in the opinion.

(1) The deceased had thrown a switch, but for the purpose of pushing the cars back to the icing station, and not letting them pass on to Chattanooga.

(2) "In view of the custom among switchmen to ride upon the footboard, and also to use it in passing from one side of the tender to the other, the jury had a right to infer, and no doubt did infer, that the deceased was on this footboard for some purpose connected with the switching operations probably to ride to the ice house, or perhaps to go on the other side to give signals to those on the engine, or it may be to cross to the other side of the track."

But there is no suggestion of even a possibility that he was boarding the engine for the purpose of throwing a switch to let a car come on to Chattanooga—the only case made in the first count.

SPECIFICATION OF ERRORS.

I.

The state court was in error in not holding that both counts of the declaration showed that the plaintiff in error and the deceased were, at the time of the accident, engaged in interstate commerce and that the case, therefore, being controlled by the Federal Employer's Liability Act, and the suit being by the widow in her own name, there could be no recovery.

II.

The state court was in error in not holding that there was no evidence to support the verdict because the proof showed that the plaintiff in error and the deceased, at the time of the accident, were engaged in interstate commerce and that the case, therefore, being controlled by the Federal Employers' Liability Act, and the suit being brought by the widow in her own name, there can be no recovery.

And under this assignment, it is insisted:

1st. The facts proven, in connection with the facts which the court must judicially know, make a clear case of interstate commerce.

2nd. The facts proven make a case, if at all, only under the second count and, in connection with the allegations of that count, fully establish the fact of interstate commerce.

BRIEF OF ARGUMENT.

I.

Where it appears either in the declaration or in the proof that the accident occurred in interstate commerce, the Act of Congress controls and, in case of death, a widow cannot recover in her own name.

Wabash R. R. Co. vs. Hayes 234 U. S. 86.
Toledo &c. vs. Slavin 236 U. S. 454.

II.

The amendment of the amended declaration amended both counts and, therefore, there was no count which did not allege interstate commerce or under which a widow could recover in her own name.

(Appendix to motion to dismiss pp 27-35.)

III.

The view expressed by the state court that only the second count was amended is not conclusive on this court.

Newport Light Co. vs City of Newport 151 U. S. 537.

Covington & L. Turnpike Co. vs Sandford 164 U. S. 595.

Mitchell vs Clark 110 U. S. 663.

Boyd vs. Nebraska 143 U. S. 135.

Vandalia R. Co. vs Indiana 207 U. S. 367.

IV.

The following facts were established by evidence introduced before the jury, viz:

A pessenger train, on which deceased was a trainman, left Chattanooga at 7 o'clock in the morning, going South on the Chattanooga Southern Railroad. On its return trip, it got back to Alton Park, a suburb

of Chattanooga, late in the afternoon, bringing three loaded fruit cars destined for delivery to the N. C. & St. L. R. R. at Chattanooga. These cars were cut out of the train for the purpose of being re-iced and then taken into Chattanooga and delivered to the connecting carrier. While engaged in switching them to the icing station, deceased was killed.

(Appendix to motion to dismiss pp 41-43 and appendix to this brief.

V.

The trial court was bound to know judicially and this court will know that the Chattanooga Southern Railroad extends from Chattanooga to the Georgia State line, and then through the state of Georgia and to Gadsden in Alabama; that Chattanooga is only about four or five miles from the Georgia State line and its suburb of Alton Park, immediately south of it, is almost on the state line.

Peyroux vs Howard 32 U. S. 324.

United States vs La Vengeance 3 U. S. 297.

United States vs Lawton 5 Howard 26.

Watts vs. Lindsey 7 Wheaton 162.

McNitt vs Turner 16 Wall. 352.

State of Pennsylvania vs Wheeling &c. 13 How. 561.

United States vs Thornton 160 U. S. 458-9.

Waters-Pierce Oil Co. vs DeSelms 212 U. S. 159.

Schollenberger vs Pennsylvania 171 U. S. 9-10.

New Mexico vs Denver &c. 203 U. S. 38.

Nicol vs Ames 173 U. S. 516-17.

Gibson vs Stevens 8 How. 399.

Brown vs Spillman 155 U. S. 665.

United States vs Trans-Missouri 166 U. S. 290.

Louisville Trust Co. vs Louisville &c. 174 U. S. 674.

Black Diamond &c. vs Excelsior Co. 156 U. S. 611.

Sligh vs Kirkwood 237 U. S. 52.

Greenleaf on Evidence (15th ed.) Sec. 6.

Thorson vs Peterson 9 Fed. Rep. 517.

Gilbert vs Moline &c. 19 Iowa 319.

Coover vs Davenport 1 Heisk (Tenn.) 368.

St. Louis &c. vs Magness 68 Ark. 289.

Perry vs State 113 Ga. 938.

Harvey vs Oklahoma, 11 Okla. 156.

Harvey vs Town of Wayne 72 Me. 430.

Bailey vs Birkhofer 123 Iowa 59.

Bond vs Perkins 4 Heisk (Tenn.) 364.

Bruson vs Clark 151 Ills. 495.

Pearce vs Langfit 101 Pa. St. 507.

Blumenthal vs Pacific Meat Co. 12 Wash. 332.

Seigbert vs Stiles 39 Wisc. 533.
Chamberlayne on Mod. Law of Evidence 741.
Hobbs vs Memphis &c. 9 Heisk (Tenn.) 874.
State vs Railroad 212 Mo. 677.
Gulf &c. R. R. Co. vs State 72 Texas 404.
16 Cyc. 861.
Miller vs Texas &c. R. R. Co. 83 Texas 518.
Smith vs Flournoy 47 Ala. 345.

VI.

The opinion of the Court of Civil Appeals shows that the allegation which that court found to be supported by the evidence and upon which it based its judgment, is in the second and not in the first count. (Appendix to motion to dismiss p. 41.)

ARGUMENT.

The result of the second trial shows that the accident was, in fact, one controlled by the Act of Congress under which the defendant in error is not entitled to recover. The question is whether the defendant in error, on the first trial, succeeded in keeping from the court and jury the facts which would undoubtedly make the Act of Congress the law of the case. The appellate courts of Tennessee thought she did. We think she did not and that the judgment of the Supreme Court of Tennessee deprives plaintiff in error of the right given him by the Act

of Congress to be exempt from liability to any one save a personal representative.

Our contentions are that (1) each count of the declaration, as amended before the first trial, and (2) the evidence, brought the case within the Act of Congress.

If we are right in both contentions, it goes without saying that the judgment must be reversed, for that the Act of Congress, when it applies, supersedes the state laws is now too well settled to require the citation of authorities.

It is equally certain that if we are right in either contention, the same result must follow.

If each count in the declaration discloses the fact of interstate commerce, no combination of evidence could entitle the defendant in error to recover, for it is axiomatic that the nature of the plaintiff's case and the statute under which he sues must be determined by his own statement of the case as contained in his declaration. This was recognized by the Tennessee courts when they held that there could be no recovery on the second count. It was assumed by this court to be the rule in Wabash R. R. Co. vs Hayes, 234 U. S. 86.

In that case the suit was for injuries not resulting

in death, and there was no question of the right of the plaintiff to sue in his own name. The facts alleged made a case under the state law if the accident happened in intrastate commerce and equally one under the Act of Congress if it occurred in interstate commerce. But there was also an allegation that it occurred in interstate commerce, making the suit one under the Act of Congress. The proof showed, however, that it happened outside of interstate commerce and the court instructed the jury that there could be no recovery under the Act of Congress. Nothing else appearing, this would have ended the case since it was brought under that Act. The court recognized that, upon the declaration as it stood, there could be no recovery under the state law, but permitted an amendment by treating the allegation of interstate commerce as eliminated, thus leaving a good declaration under the state law. There was a recovery and this court dismissed a writ of error upon the ground that the allowing of the amendment, after the evidence showed that the Act of Congress did not apply, was a matter of state practice and presented no Federal question. But the clear implication from the opinion is that no judgment could have been based on the declaration if it had been left unamended and the allegation of interstate commerce had not been eliminated.

If, therefore, there is no count in this declaration which omits the allegation of interstate commerce, the judgment must be reversed regardless of what the evidence was.

But if there is such a count, no recovery can be based on it as it appears, from the proof, that the accident occurred in interstate commerce.

Toledo St. L. & W. R. Co. vs Slavin 236 U. S. 454.

THE DECLARATION. We agree that neither the single count composing the original declaration nor the additional count filed to make the amended declaration alleged interstate commerce.

This was brought into the case by the amendment of the "amended declaration." This latter amendment was treated by the Court of Civil Appeals, without discussion or assignment of reasons, as amending only the second count. In this way, it concluded that the first count remained a count under the state laws. And counsel now insist that this conclusion cannot be reviewed because it relates to a matter of practice. But the question of whether a declaration, with its amendments, states a case under an Act of Congress must not be confused with the question of the time and manner of making amendments. The action of the state courts in allowing

or refusing amendments is not subject to review here. But when an amendment is once made, the question as to whether it states a case controlled by the Act of Congress is one ultimately for this court.

> "This court must determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court under Section 709 of the Revised Statutes."
>
> Newport Light Co. vs City of Newport 151 U. S. 537.

> "When a party specially sets up and claims a right or privilege under the Constitution or laws of the United States, the question of the sufficiency of allegations to present that issue is not concluded by the view expressed by the State Court."
>
> Covington & L. Turnpike Road Co. vs Sandford 164 U. S. 595.

Perhaps the case most exactly in point is Mitchell vs Clark 110 U. S. 663.

In that case a tenant, sued for rent accruing in St. Louis during the Civil War, defended upon the ground that the property of the landlord was seized by the military authorities and that, St. Louis being then under military law, he was compelled to pay the rents to General Schofield, who was then in

command, and that, under an Act of Congress, this payment discharged him from further liability. The state court decided against him, not because the Act of Congress did not have the effect claimed but because it held the plea setting up the defense bad for failure to set out a copy of the order of General Schofield either in *haac verba* or in substance. It was insisted that this holding could not be reviewed because it involved only a question of practice. But this court said:

> "The question whether a plea sets up a sufficient defense, when the defense relied on arises under an Act of Congress, does present, and that necessarily, a question of Federal law; for the question is and must be: does the plea state facts which under the Act of Congress constitute a good defense?"

And this language was quoted with approval in Boyd vs Nebraska 143 U. S. 135.

Where an unreasonable or forced construction has been placed by a state court upon a pleading and the result of that construction is to avoid a Federal question, this court is not concluded but will construe the pleading for itself. Or, to use the language of the court:

> "Now the construction of a pleading, the

> meaning to be given to its various allegations, and the determination of the validity of a contract made by parties in reference to real estate in the state, are, as a rule, local questions. Doubtless this court is not concluded by the ruling of the state court, and must determine for itself whether there is really involved any Federal question which will entitle it to review the judgment. Newport Light Co. vs Newport 151 U. S. 527 and cases cited in the opinion. A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings, * * * *."
>
> Vandalia R. Co. vs Indiana 207 U. S. 367.

In the present case an "amended declaration" consisting of two counts makes a case under the state law. The case is then converted into a suit under the Act of Congress by an amendment of the "amended declaration" introducing the fact of interstate commerce. The order making the amendment does not refer to any separate count, but merely adds the new allegation after certain words which occupy the same relative position in each count. We submit that it requires a strained and unnatural and unreasonable construction of this amendment to say either count was left unamended. And the only effect of such a construction is to avoid a Federal question

which, we insist, is really present in the case under any reasonable construction. If the original declaration had contained an allegation of interstate commerce, and the state court had avoided a Federal question by ignoring this allegation in its construction of the declaration, this court would, of course, not be concluded. And this, in effect, is what was done when the amendment allowed by the trial court was ignored.

THE EVIDENCE. But, even if the first count can be treated as unamended, the verdict still cannot stand upon the evidence.

We have established by positive evidence these facts:

A passenger train, with deceased as one of the trainmen, left Chattanooga at 7 o'clock in the morning, going South on the Chattanooga Southern Railroad. It got back to Alton Park, a suburb of Chattanooga, on its return trip, late in the afternoon, bringing three loaded fruit cars destined for delivery to a connecting carrier at Chattanooga. These cars were cut out of the train for the purpose of being reiced and then delivered to the connecting carrier at Chattanooga. While engaged in switching them to the icing station, deceased was killed.

JUDICIAL NOTICE. It is true that no witness, in terms, tells where the train came from. But when the facts above recited are supplemented by certain matters of common knowledge which the trial court was bound to know judicially and which this court will, therefore, know, there can be no doubt that it came from without the state of Tennessee.

This court has said:

> "It certainly cannot be laid down as a universal, or even as a general proposition that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts particularly with respect to geographical positions of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice.
>
> Peyroux vs Howard 32 U. S. 324.

In that case, the court took judicial notice of the fact that New Orleans was within the ebb and flow of the tide.

Other facts of which judicial notice has been taken are: the geographical position of Sandy Hook, United States vs La Vengeance 3 U. S. 297; the River St. John, its length, course, and the lakes on it, United States vs. Lawton 5 Howard 26; the location of the

Ohio and Little Miami Rivers, Watts vs Lindsey 7 Wheaton 162; that the Military Bounty tract in Illinois is between the Illinois and Mississippi Rivers and west of the fourth principal meridian, McNitt vs Turner 16 Wall. 352; that the Ohio River is navigable, that Pennsylvania has made improvements by canals, railroads and turnpikes from Eastern Pennsylvania to Pittsburg and that goods and passengers thus transported are conveyed to and from Pittsburg on the Ohio River, State of Pennsylvania vs Wheeling &c. Bridge Co., 13 Howard 561; that a person could not travel from Mare Island, Cal., to Washington, D. C. and back within four days, United States vs Thornton 160 U. S. 658-9; the custom in the community to use coal oil in kindling fires, Waters-Pierce Oil Co. vs DeSelms 212 U. S. 159; the nature of oleomargarine, the extent of its manufacture, and that it is prepared as an article of food, as known by every intelligent man and as shown by official reports, encyclopedias &c., Schollenberger vs Pennsylvania 171 U. S. 9-10; that in New Mexico cattle are required to be branded and run at large, New Mexico ex rel. vs. Denver &c. R. R. Co., 203 U. S. 38; facts universally recognized, and which relate to the common and ordinary way of doing business throughout the country with special reference to boards of trade, Nicol vs Ames 173 U. S. 516-17; the ordinary course and usages of commission merchants in their

business, Gibson vs Stevens 8 Howard 399; whatever ought to be generally known within the limits of the court's jurisdiction, Brown vs Spillman 155 U. S. 665; that agreements as to rates have been made between railroad companies and that there have been numerous complaints of the violation of such agreements, United States vs Trans-Missouri &c. 166 U. S. 290; the usual objects and results of foreclosure of railroad mortgages, Louisville Trust Co. vs Louisville &c. R. R. Co. 174 U. S. 674; devices so common that they have been used for many purposes, Black Diamond &c. vs Excelsior Coal Co., 156 U. S. 611; that the raising of citrous fruit is one of the great industries of the State of Florida, Sligh vs Kirkwood 237 U. S. 52.

These cases cover a sufficiently wide range to show that this court follows the generally accepted rule that courts will not pretend to be more ignorant than other people, but will draw upon their own sources of knowledge for such information as is common to all intelligent persons of the same community.

Greenleaf on Evidence (15th ed.) Sec. 6.

Among the things which the courts judicially know are the following:

The boundaries of the state in which they are held.

Thorson vs Peterson 9 Fed. Rep. 517.

Gilbert vs Moline &c. 19 Iowa 319.

The political divisions of the state in which they are held, including the location of cities and towns.

Coover vs Davenport 1 Heisk. (Tenn.) 368.
St. Louis vs Magness 68 Ark. 289.
Perry vs State 113 Ga. 938.
Harvey vs Oklahoma 11 Okla. 156.
Harvey vs Town of Wayne 72 Me. 430.
Bailey vs Birkhofer 123 Iowa 59.
Bond vs Perkins 4 Heisk. (Tenn.) 364.
Bruson vs Clark 151 Ills. 495.
Pearce vs Langfit 101 Pa. St. 507.
Blumenthal vs Pacific Meat Co. 12 Wash. 332.
Seigbert vs Stiles 39 Wisc. 533.

Matters of geography which are common knowledge, and this includes the location, course, and termini of railroads as well as the towns and stations on them and the distance between such towns and stations.

This latter rule is thus stated by a recent text writer:

> "Judges are aware, with the rest of the community, of the existence of the principal lines of railroad which are wholly or in part within the state; and will know, if the public does, to what more general system, if any, the road belongs

> "The common knowledge includes locality, course, and direction of such a railroad."
> Chamberlayne on Modern Law of Evidence Sec. 741.

The rule has long been recognized by the courts of Tennessee.

> Hobbs vs Memphis &c. 9 Heisk (Tenn.) 874.

The reason for the rule has been thus stated by a state court:

> "We know as well that defendant's railroad is a main traveled highway, a throbbing artery of commerce stretching from St. Louis on the eastern line of this state to Kansas City on the western line and away into other states, as we know that the Missouri river exists as a navigable stream and takes the same course."
> State vs Railroad 212 Mo. 677.

And again:

> "It is a matter of history that important lines of railroad once established have remained as fixed and as permanent in their course as the rivers themselves; they supersede in the main all other modes of travel between the points which they touch, and become as well if not better known than any other geographical feature of the country. Their locality becomes 'notorious and indisputable.' For instance, can we doubt

that the Houston & Texas Central Road runs from Houston to Dallas, and the Gulf, Colorado & Santa Fe touches with its lines the same points? Can we doubt that they run during a considerable portion of their lines practically parallel to each other, and that they must necessarily compete for the traffic lying between them."

Gulf &c. R. Co. vs State 72 Texas 404.

Other statements by text writers are:

"As a fundamental fact of general knowledge a court knows of the existence and location of railroads, whether they are wholly within its jurisdiction or only partly so, and knows to what system, if any, they belong. Courts will also to a not very well defined extent notice the minor facts connected with railroad locations in their jurisdiction. Thus it has been held that the courts may know that railroads are in operation between two places, the distance between them, that these points are within a certain county, the geographical positions of towns on the line of a railroad, and that a railroad cannot be located in a given direction from one place to another without passing through a third. In like manner courts will notice that a town contains a station on a certain railroad or that it is a railroad terminus or center."

16 Cyc. 861.

Cases to the same effect are:

Miller vs Texas & N. O. Ry. Co. 83 Texas 518.
Smith vs Flournoy 47 Ala. 345.

We find no case in which this court has judicially taken notice of a railroad to the extent above indicated. But we do not find that it has declined to do so. And the ruling we ask is the logical result of what it has held in the cases cited. It is coming to be recognized by the courts generally and by the recent text writers.

And if judicial notice is to be taken of matters of common knowledge in the community, we can think of no more fitting object than the railroads of the country. They are public highways. They are as much a part of the geography of the country as rivers, mountains, or cities and as permanent and well known. In fact, the average citizen probably knows the railroad which passes through his community, its course, its termini, and its stations better than any natural object in his vicinity.

We think the trial court, therefore, must be held to have known judicially, as every intelligent man in the community knew, that the Chattanooga Southern Railroad ran from Chattanooga to the Georgia state line and then through the state of Georgia and to Gadsden in Alabama; that Chattanooga is only

four or five miles from the state line and that its suburb of Alton Park is immediately south of it and almost on the Georgia state line. When, therefore, it appears that a train, returning from an all-day trip down this railroad came into Alton Park, it is undoubtedly shown that it was an interstate train and hence that the accident occurred in interstate commerce.

But even if it cannot be said that the evidence alone establishes interstate commerce, this assignment must be sustained if the evidence, in connection with the declaration or count upon which a judgment must rest, shows that fact.

It is true that a declaration may contain two counts, one under the state law and another under the Act of Congress and that there may be a recovery upon either that happens to fit the facts shown in evidence. When both counts charge the same facts except one alleges interstate commerce while the other does not, there may be a recovery upon the one or the other according as the fact of interstate commerce is or is not proven.

But suppose the count which does not allege interstate commerce predicates liability upon a state of facts wholly different from that stated in the count which does allege interstate commerce. And then

suppose the proof should show that the accident happened in the manner described in the interstate commerce count and not in the manner described in the other count. If, as in this case, it turned out that the plaintiff could not, under the Act of Congress, recover in her own name, could it be said that there could be a recovery upon the other count which had not alleged the facts upon which liability must be predicated?

But that is this case exactly. The first count, if it must be treated as unamended, is the count under the laws of Tennessee. It alleges that the accident occurred while deceased was obeying an order simply to throw a switch and let a car pass.

The second count, on which confessedly there can be no recovery, because it alleges interstate commerce, alleges that he was obeying orders to take a train into Chattanooga which made certain switching operations necessary and required him to be on the foot board to give signals.

Manifestly if there can be a recovery under the state law, it must be predicated on the facts alleged in the first count.

The facts alleged in the second count, if proven, cannot support a verdict because they must be taken

in connection with the allegation of interstate commerce also contained in that count.

And the facts recited in the opinion of the Court of Civil Appeals, from which we have quoted, are those alleged in the second and not in the first count. While that court held that a judgment could be based on the first count, this manifestly was done through confusing the allegations of the two counts. This is made plain by the opinion itself.

After reciting the facts upon which the count predicated liability, the allegation upon which the judgment is to be based is singled out in this language:

> "The original declaration avers that the defendant company owned a line of road from Alton Park to Chattanooga, and that deceased was ordered to take these fruit cars from Alton Park to Chattanooga. He was engaged in obeying these orders when he was injured."
> (Appendix to motion to dismiss p. 41.)

But, as we have seen, neither this allegation nor anything like it is in the first count. It appears only in the second.

The court has thus placed the right to recover upon an allegation which appears only in a count which also alleges interstate commerce and upon which no

judgment in favor of defendant in error can be rested. The proof, in connection with this allegation, makes a case on which defendant in error cannot recover and plaintiff in error cannot be deprived of the exemption given him by the Act of Congress by the mistaken act of the state appellate court in treating an allegation in one count as being in another.

For the reasons stated, we submit that the judgment of the Supreme Court of Tennessee should be reversed.

LEWIS M. COLEMAN,
WM. L. FRIERSON,
Attorneys for Plaintiff in Error.

APPENDIX.

PLAINTIFF IN ERROR'S STATEMENT OF THE ERRORS HE INTENDS TO RELY ON AND THE PARTS OF THE RECORD WHICH HE THINKS NECESSARY FOR THE CONSIDERATION THEREOF.

The plaintiff in error intends to rely upon the following assignments of error, viz:

1st. The court erred in not holding that both counts of the declaration stated a case controlled by the Act of Congress commonly known as the Employer's Liability Act and that, therefore, the widow could not recover in a suit commenced in her own name.

2nd. The court erred in not holding that the evidence on the first trial made a case controlled by the Act of Congress commonly known as the Employer's Liability Act.

He further states that the parts of the record which he thinks necessary for the consideration of these assignments of error are as shown in the attached stipulation of counsel.

This February —— 1916.

LEWIS M. COLEMAN,
WM. L. FRIERSON,
Attorneys for Plaintiff in Error.

STIPULATION OF COUNSEL AS TO PRINTING OF RECORD.

It is agreed that the only parts of the record which need be printed or are pertinent to the questions raised by the assignments of error or necessary to be considered in determining them, are those parts which have been printed as an appendix to the motion to dismiss the writ of error or affirm the judgment; and the following stipulation of counsel as to the testimony introduced in the first trial of this case, viz:

> "It is agreed that the testimony in the trial of this case showed that the deceased Gray on the day of the accident came into Alton Park, Tennessee, a suburb of Chattanooga, Tennessee, as one of the trainmen on a train coming into Chattanooga on the plaintiff in error's line of railroad from the south; and that this train had left Chattanooga at seven o'clock that morning; that it had come into Alton Park late in the afternoon on its return trip; that at Alton Park two loaded fruit cars, which were to be delivered to the Nashville, Chattanooga & St. Louis Railroad at Chattanooga, were cut out of this train for the purpose of being iced, and that the deceased was ordered to bring them into Chattanooga after they had been switched to the icing station at Alton Park and iced; and that the accident resulting in the deceased's death occurred

while he and other employees were engaged in switching said cars to said icing station at Alton Park."

This February 11th, 1916.

L. M. COLEMAN,
WM. L. FRIERSON,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1915.

No. 373.

E. C. OSBORNE, Receiver of the Chattanooga Southern Railroad Company,
Plaintiff in Error,

vs.

JENNIE B. GRAY,
Defendant in Error.

REPLY TO MOTION TO DISMISS OR AFFIRM.

FEDERAL QUESTION INVOLVED. Broadly stated, the error of the state court to correct which the writ of error was sued out is that, by a failure to properly apply the Federal Employers' Liability Act, it has rendered a judgment in favor of a widow for the death of her husband, and thereby deprived plaintiff in error of the right to be shielded, by that statute, from responsibility to anyone except the personal representative of a deceased employe killed while engaged in interstate commerce.

Seaboard Air Line vs. Padgett, 236 U. S. 668.

HOW THE QUESTION ARISES. To understand the

question involved, a brief history of the case is necessary.

The defendant in error sued, in her own name, as widow, to recover damages for the death of her husband while in the employ of plaintiff in error as receiver of an interstate railroad extending from Chattanooga, Tennessee, which the court will judicially know, is almost on the Tennessee-Georgia state line, into the states of Georgia and Alabama.

On the final trial, it was admitted that deceased, at the time of his death, was engaged in an act of interstate commerce, and, for that reason, the court directed a verdict in favor of the defendant below. There had, however, been a previous trial at which the court had refused a motion to direct a verdict, and a verdict and judgment had been rendered for $10,000.00. But a motion for a new trial was filed upon the grounds that there was no evidence to support the verdict and for error in the charge. The court sustained the motion upon the ground of error in the charge without passing on the other ground, and the plaintiff below took a wayside bill of exceptions. After the trial, the plaintiff below asked leave to amend so as to sue as administratrix, but this was refused. The plaintiff below, having appealed to the Court of Civil Appeals from the final judgment against her, that court, in accordance with the state practice, first considered her assignment of error

which challenged the action of the trial judge in setting aside the first verdict, and reached the conclusion that there was no error in the charge for which the verdict should have been set aside. It held, however, that if the ground of the motion for a new trial, that there was no evidence to support the verdict, was good, the verdict should have been set aside, and the action of the trial court would be affirmed on that ground.

In support of the claim that there was no evidence to support the verdict, the present plaintiff in error insisted, among other things, not now necessary to be mentioned, that it appeared both in the evidence and in each count of the declaration that the accident occurred while deceased was engaged in interstate commerce and that, therefore, there could, under the Federal Employers' Liability Act, be no recovery by the widow.

The Court of Civil Appeals considered and, in an opinion, passed on these questions. It held that the second count of the declaration did disclose the fact of interstate commerce, but that the first did not, merely stating a cause of action under the state law. And reaching the conclusion that the evidence did not show the facts necessary to bring the case within the Act of Congress, but made a case under the first count, it entered a judgment on the first verdict.

Upon a petition for the writ of certiorari, the Supreme Court of Tennessee affirmed this judgment without an opinion. (The facts thus far stated appear in the appendix to the brief of defendant in error pp. 41-47.)

The assignments of error in this court are:

1st. The court erred in not holding that both counts of the declaration stated a case controlled by the Act of Congress commonly known as the Employers' Liability Act and that, therefore, the widow could not recover in a suit commenced in her own name.

2nd. The court erred in not holding that the evidence on the first trial made a case controlled by the Act of Congress commonly known as the Employers' Liability Act.

With this statement of the case, we submit our replies to the points made in support of the motion to dismiss.

I.

SPECIFIC QUESTION.

The writ of error rests upon the claim, asserted by us, that the state court, in deciding that the Federal Employers' Liability Act does not apply to a given state of facts shown (1) in the declaration and

(2) in the proof, has failed to properly apply that Act and has thus deprived plaintiff in error of the right to be shielded from responsibility to anyone except a personal representative of deceased.

This clearly presents a Federal question.

St. Louis Etc. R. R. Co. vs. Seale, 229 U. S. 156.

St. Louis Etc. R. R. Co. vs. McWhirter, 229 U. S. 265.

Seaboard Air Line vs. Padgett, 236 U. S. 668.

II.

WHAT NECESSARY TO SUSTAIN MOTION.

The question involved being clearly a Federal question, the motion cannot be sustained unless "the right asserted is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous."

Seaboard Air Line vs. Padgett, 236 U. S. 668.

III.

QUESTION NOT FRIVOLOUS.

The question we present is, in no sense, frivolous, nor has it been determined against us by any reported opinion of this court. On the contrary, the decisions of this court, in principle, sustain our con-

tention. It has been decided too often to require the citation of cases that when the fact of interstate commerce appears, either in the plaintiff's pleadings or in the proof, the case is controlled by the Act of Congress. If, therefore, we show this fact either from the declaration or the evidence, we are entitled to a reversal of the judgment of the Supreme Court. We think it appears in both.

1st. THE DECLARATION. The original declaration consisted of a single count. Later, by leave of the court to amend, a second or additional count was filed, making an *amended declaration* consisting of two counts. Both counts showed that plaintiff in error was engaged in operating an interstate railroad, the first describing it as "in Chattanooga and Hamilton County, Tennessee, and extending into the State of Georgia and certain parts of the State of Alabama," and the second as "from the City of Chattanooga, Tennessee, into the states of Georgia and Alabama." Both alleged that one of the lines operated by plaintiff in error ran from Chattanooga to Alton Park, Tennessee, a suburb of Chattanooga. Both alleged that deceased was employed in the operation of this railroad and that the accident happened at Alton Park while he was so employed. But neither expressly alleged that he was, at the time, engaged in interstate commerce. The first merely alleged that he was ordered to throw a switch on one of the

tracks so that a car could come into Chattanooga, and while obeying this order was killed. The second alleged that he was conductor on a passenger train running from Gadsden to Chattanooga, but that, when his train reached Alton Park, he was ordered to leave it and assist another crew to bring a train into Chattanooga, and was killed while obeying this order.

Still later, and before the first trial, by an entry on the minutes of the court the "amended declaration" was amended by inserting after the words, "he then and there died," the allegation that he was, at the time, engaged in interstate commerce. This order made no reference to the first, the second, or the additional count, but merely amended the "amended declaration", which then consisted of two counts, by inserting the new allegation after the words "he then and there died." And these are the concluding words in the next to the last paragraph in each count. There is no more reason for limiting the amendment to the one count rather than to the other. Manifestly, counsel, for some reason, desired to introduce into his case generally, and without particular reference to any count, the fact of interstate commerce. And finding an expression common to both counts, he had the "amended declaration" amended merely by inserting the new matter after this common expression.

We think the state court was clearly in error when it limited this amendment to the second count so as to leave the first count unamended.

But counsel say this presents merely a question of "the interpretation of pleadings and the effect of the amendment of pleadings" as to which, they say, the ruling of the state court is conclusive, and cite Central Vt. Ry. Co. vs. White, 238 U. S. 507.

Of course, they cannot mean that when certain facts are stated in a pleading, this court is precluded, by the opinion of the state court, from determining for itself whether those facts make a case under an Act of Congress. The case cited furnishes no support for such a contention.

Indeed that case, after recognizing that matters of practice and matters respecting the remedy depend upon the law of the state, said:

> "But matters of substance and procedure must not be confounded because they happen to have the same name."

And it was accordingly held that the question of the burden of proof as to contributory negligence was governed by the Federal Employers' Liability Act.

Of course, the question of when and how amend-

ments may be made is one governed by the law of the state.

Thus it has been held that the action of the state court permitting an amendment during the trial—striking out of the declaration the allegation of interstate commerce—is not subject to review here.

Wabash R. R. Co. vs. Hayes, 234 U. S. 86.

But when the amendment is made, the ultimate right to interpret it and determine whether the case made by the amended declaration is one governed by the state or the federal law, must, of necessity, be in this court.

And this is all we insist on. The state court had the right to permit such amendments as it saw fit either by striking out of or adding to one or both counts and its action in that regard is not subject to review here. But when the trial court has, by apt words, amended both counts by introducing new facts, the construction, by the appellate state court, of the amendment in so far as it involves the application of an Act of Congress is subject to review in this court.

2nd. THE FACTS. But even if it could be said that the first count stated a case under the state law and was not amended, there was no evidence to support a verdict in favor of the widow if it appeared

in the proof that the accident occurred in the course of an interstate movement.

Toledo Etc. vs. Slavin, 236 U. S. 454.
St. Louis Etc. R. R. Co. vs. Seale, 229 U. S. 156.

Counsel say that this assignment of error presents only a question of "fact passed upon adversely to the plaintiff in error by the three courts of Tennessee which is conclusive here," and cite Dower vs. Richards, 151 U. S. 658 and Meidrich vs. Lauenstein, 232 U. S. 236.

But, if it was necessary to determine whether these facts were correctly found, this court would examine the evidence for that purpose.

The cases cited recognize these two exceptions to the rule that this court will not, on writ of error, review findings of fact:

(1) Where a Federal right is denied as the result of a finding of fact which it is contended there was no evidence whatever to support.

(2) Where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing on the Federal question, to analyze and dissect the facts.

Creswell vs. Grand Lodge, 225 U. S. 263.
Kansas City Etc. vs. Albers, 223 U. S. 573.

In this case the contention is that the evidence shows, without conflict, that the deceased was engaged in interstate commerce and that there is no evidence to support a finding that he was engaged in intra-state commerce.

And the plaintiff has been denied the protection of an Act of Congress as a result of a finding of fact which is so intermingled as to cause it to be necessary, for the purpose of passing on the Federal question, to analyze and dissect the facts.

Hence, if necessary, the evidence is open to review here. However, but little, if any, examination of the evidence will be necessary. There is no conflicting evidence. The state court did not find that there was any evidence that deceased was, in fact, engaged in intra-state commerce, but only that the evidence failed to show affirmatively whether he was engaged in interstate or intra-state commerce. The facts recited in the opinion of the Court of Civil Appeals and those set out in the stipulation copied into the brief of counsel are practically identical.

Our contention is that these facts, together with the necessary inferences arising from them, and in connection with facts which the court must judicially know, make a case to which the Federal Employers' Liability Act applies.

The Court of Civil Appeals set out, in its opinion,

the facts which it regarded as established by the evidence and from which it concluded that there was no evidence to establish the fact of interstate commerce. We quote these findings and conclusions.

> "The proof indicates that the deceased came into Alton Park on a passenger train, and, as a part of this train there were three cars loaded with peaches. These cars were taken out of the passenger train at Alton Park, when the train went on to Chattanooga depot. After the fruit cars were taken out of the passenger train, the deceased was directed by one of his superiors to have them re-iced and then taken to Cravens and delivered to the N., C. & St. L. Railroad Company. The proof does not show that the passenger train on which the deceased came into Alton Park, and a part of which the fruit cars were, came from another state, and. in fact, fails to show how far through or into what part of Tennessee the railroad of defendant company is located, and to what point it operates trains. * * * * * *
> The fruit cars which he was ordered to take and deliver to the Nashville road, so far as this record discloses, were taken out of a passenger train in Alton Park. The proof does not indicate where they came from, whether from another state, or whether they were picked up in Tennessee. The proof does not show where the passenger train came from, or whether it had ever been out of Tennessee.
> * * * * * * * *

> We cannot say that the passenger train on which he came to Alton Park had been engaged in interstate commerce; nor can we say from the record that the three fruit cars had then come from another state into Tennessee. We do not know where the passenger train came from, nor where these fruit cars came from; all we do know is, they were cut out of the passenger train at Alton Park, and the deceased was ordered to take them down into Chattanooga and deliver them to the N., C. & St. L. R. R. Co. That being true, the deceased and these cars were engaged in intrastate commerce when he received his fatal injury, and not in interstate commerce."
>
> (Appendix to brief of defendant in error, pp. 40 to 43.)

THE STIPULATION OF COUNSEL as to the evidence, copied in the brief of defendant in error at page 11, supplements the facts recited in the opinion of the court only by adding the specific statement that the passenger train in question was "coming into Chattanooga on the plaintiff in error's line of railroad *from the south*", and that the accident occurred while deceased and other employees were engaged in switching the fruit cars, which had been cut out of the train, to the icing station to be iced preparatory to being taken into Chattanooga and delivered to another railroad, which facts already appeared by

necessary inference from what was stated in the opinion.

FACTS JUDICIALLY KNOWN. The facts which this court will judicially know are that Chattanooga is almost on the Georgia state line; that passenger trains are run over considerable distances for the purpose of picking up passengers along the route; and that such a train coming into Chattanooga from the south must necessarily come from the State of Georgia.

Peyroux vs. Howard, 7 Pet. 324.

United States vs. La Vengeance, 3 Dall. 297.

United States vs. Lawton, 5 How. 10.

Watts vs. Lindsay, 7 Wheat. 158.

McNitt vs. Turner, 16 Wall. 352.

The Daniel Ball vs. United States, 10 Wall. 557.

Pennsylvania vs. Wheeling Etc., 13 How. 518.

United States vs. Thornton, 160 U. S. 654.

Waters-Pierce Oil Co. vs. Deselms, 212 U. S. 159.

Schollenburger vs. Pennsylvania, 171 U. S. 1.

McLean vs. Denver Etc., 203 U. S. 38.

Petit vs. Minnesota, 177 U. S. 164.

Nicol vs. Ames, 173 U. S. 509.

Gibson vs. Stevens, 8 How. 384.

Brown vs. Spillman, 155 U. S. 665.

United States vs. Trans-Missouri, 166 U. S. 29.

Louisville Trust Co. vs. Louisville Etc., 174 U. S. 674.

Black Diamond vs. Excelsior, 156 U. S. 611.

Richards vs. Chase. 158 U. S. 299.

Upon these facts we insist not only that the question made is not frivolous and has not been decided adversely to our contention, but that the state court was clearly in error in holding that the fact of interstate commerce was not shown by the evidence.

IV.

RIGHT SET UP IN STATE COURT.

But it is said in the brief of counsel that there is nothing in the record, except the certificate of the chief justice of Tennessee, to show that a Federal question was decided by the state court or that the immunity from liability, under the Federal Employers' Liability Act, now claimed, was "especially set up or claimed" in the state court.

In this statement counsel are plainly mistaken.

The petition for writ of error states that one of the grounds of the motion, in the trial court, was that there was no evidence to support the verdict

and that, in the Court of Civil Appeals, in support of this motion, it was insisted (1) that both counts of the declaration, as amended, made a case which was controlled by the Employers' Liability Act of Congress, and hence the plaintiff, in her right as widow, could not recover, and (2) that the evidence on the first trial brought the case under the control of the same Act of Congress.

It was then stated that that court decided both of these contentions adversely to the present plaintiff in error; that, in the Supreme Court, the same contentions were made and again decided adversely.

And the assignment of errors challenges these rulings of the state courts and expressly invokes the Federal Employers' Liability Act as a protection against a judgment in favor of the widow in her own right. (Appendix to brief of defendant in error, pp. 50-53.)

The averments of the petition are fully sustained by the record. That both the questions now made were considered and determined is shown by the opinion of the Court of Civil Appeals. The rule of practice under which, if there was, in fact, no case which should properly have gone to the jury, the action of the trial judge in granting a new trial will be affirmed, although he may have based his action on some mistaken ground, is first stated.

Three pages of the opinion are then devoted to a discussion of the pleadings and the conclusion finally reached that the first count was unamended and remained a count under the state law.

Taking up the contention that the evidence made a case controlled by the Federal Employers' Liability Act, the court recognized this contention as determinative of the case, regardless of all other questions, saying:

> "If we should find that the proof showed that the deceased was engaged in interstate commerce when he was injured, then we would be compelled to hold that the trial judge was not in error in setting aside the verdict for $10,000.00 and granting a new trial." (Appendix to brief of defendant in error, p. 40.)

After considerable discussion, the conclusion was reached that the evidence did not establish the fact of interstate commerce. (Id. 40-43.) The action of the Court of Civil Appeals was affirmed by the Supreme Court of Tennesee, without an opinion. Thus these questions were raised in a manner, which, under the state practice, brought them before those courts for decision, and they were decided.

This is all that is required.

> "When a state court holds that a Federal question is made before it, according to its

practice, and proceeds to determine it; this court will regard the question as duly made."

Miedreich vs. Lauenstein, 232 U. S. 243.

We do not know any better means of showing what was decided by a court than its own opinion.

V.

NOT QUESTION OF VARIANCE.

Counsel say that if both counts were amended so as to allege interstate commerce, the present contention that there can be no recovery presents only a question of variance between the pleading and proof, which was raised, for the first time, in the Supreme Court of Tennessee. Unfortunately for this contention, the question, whatever it is, was treated by the Court of Civil Appeals as properly raised by the motion for a new trial and that court elaborately considered and passed on it.

But counsel misapprehend our contention. We make no question based on a variance. We say that both pleadings and proof show interstate commerce. Our point is that when both counts were amended, the declaration was one upon which no judgment in favor of the plaintiff could stand. It was, of course, demurrable. But we were not bound to demur. We could, if we chose, let the case go to judgment, and then move in arrest upon the ground that the dec-

laration stated no case. It did not become necessary to make a motion in arrest of judgment. Under the Tennessee practice, a motion for a new trial must be made before a motion in arrest of judgment or it will be overruled.

Hall vs. State, 110 Tenn. 365.

There was the question as to what the evidence showed on the subject of interstate commerce as well as other defenses equally available under the State or the Federal Law. Hence we filed a motion for a new trial, leaving us free to make a motion in arrest of judgment if unsuccessful on that motion. But the motion for a new trial was sustained.

If, however, the Supreme Court of Tennessee had agreed with us that the declaration, in each count, alleges the fact of interstate commerce, but had held that the deceased at the time of the accident was should not have been sustained, it would have entertained and sustained a motion in arrest of judgment.

Thurston vs. State, 3 Cold. (Tenn.) 115.

It is true that one of our defenses on the trial was that the deceased at the time of the eccident was not in the line of his duty, but had been temporarily relieved of duty and was riding on the engine for his own purposes and, therefore, assumed the risk. This was available under either the state or federal law. The evidence, however, as to it was conflicting, and

the jury and state courts have decided against us. But this is, in no wise, inconsistent with the contention that, assuming, as has now been conclusively decided, he was in the line of his duty, he was engaged in interstate commerce.

Likewise, the extract from the charge at page 22 of the brief would be equally applicable to the case under the state or federal law. It is a charge upon the effect not of contributory negligence, but of the assumption of risk.

VII.

THE GENERAL ISSUE.

It is said that, in Tennessee, when the general issue is pleaded, as in this case, it is necessary to give notice of the real defenses, and a statute is quoted. It is sufficient answer to say that no such question was made in the state courts and that the appellate court treated the defenses as properly made and considered them.

But it was long ago decided that a defendant has his election to plead the general issue, in the form used at common law, without notice, or, under this statute, with notice.

Railroad vs. Conk, 11 Heisk. (Tenn.) 576.

The bar has so uniformly adopted the former that

we do not recall having ever seen, in a practice of twenty-five years, the general issue pleaded with notice.

VIII.

While we insist that the motion to dismiss or affirm cannot be sustained, we are inclined to agree with counsel for defendant in error that the case should be put on the summary docket for hearing on the merits. The questions involved may be fully determined on the parts of the record presented with the motion and do not, in our opinion, require extended argument.

Respectfully submitted,

WM. L. FRIERSON,

LEWIS M. COLEMAN,

Attorneys for Plaintiff in Error.